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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-10, 77-11, 77-12, 77-47 and 77-64

EXXON CORPORATION AND PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, CONTINENTAL OIL COMPANY AND KAYO OIL COMPANY, GULF OIL CORPORATION, ASHLAND OIL, INC., COMMONWEALTH OIL REFINING COMPANY, INC., AND PETROLEUM MARKETING CORPORATION,

Appellants,

v.

GOVERNOR OF THE STATE OF MARYLAND, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO FILE A BRIEF OF AMICI CURIAE

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE

FILED ON BEHALF OF DAY ENTERPRISES, INC. TRADING AS DAY'S CROWN: BOOTH'S, INC.; DONLAN ENTERPRISES, INC. and PLB INDUSTRIES, INC.

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The Daily Record Co., Baltimore, Md. 21202

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Day Enterprises, Inc. trading as Day's Crown, Booth's, Inc., Donlan Enterprises, Inc. and PLB Industries, Inc. hereby move, pursuant to Rule 42(3) of this Court, for leave to file the attached brief as *amici curiae* in support of the appellee. This motion is necessitated by the refusal of the appellants to consent to the filing of this brief.

The interest of the *amici curiae* group is set forth in detail in the brief. To summarize, however, *amici* operate independent gasoline service stations at four locations in Baltimore and Laurel, Maryland. The service stations are leased from their supplier, Crown Central Petroleum Corporation ("Crown").

Crown is the largest independent gasoline marketer in Maryland and enjoys approximately a five percent share of gallonage sales in Maryland. It possesses the fifth largest market share in Maryland of all gasoline marketers, including the major oil companies, being surpassed only by Exxon, American Oil, Shell and Gulf. Beginning in 1968, Crown began to sell its gasoline to independent dealers in multi-pump stations, selling gasoline and motor oil, unaccompanied by auxiliary services. However, Crown attempted to exercise rigorous control over the prices charged by its dealers for gasoline. As a consequence, in 1973 Crown was sued in the United States District Court for the District of Maryland by four dealers. On May 20, 1975, the United States District Court for the District of Maryland found that Crown had violated Section 1 of the Sherman Act by entering into illegal vertical agreements fixing the retail prices of gasoline in the Baltimore metropolitan area and by conspiring horizontally with competitors including Ashland Oil, Petroleum Marketing Corporation, Amerada Hess Corporation and Meadville Corporation in the fixing of retail prices of gasoline in the Baltimore metropolitan area. Phillips, et al. v. Crown Central Petroleum Corporation, 395 F. Supp, at 735, appeal pending. Subsequently, on June 1, 1976, an indictment against Crown, in addition to the other companies, was returned by the United States grand jury at Baltimore. After a three month trial, on August 30, 1977, Ashland, and PMC, appellants herein, as well as others, including Kayo, the marketing subsidiary of appellant Continental Oil Co., were convicted by a jury

in the United States District Court for the District of Maryland and subsequently were sentenced to the maximum criminal penalty provided by the antitrust laws. Crown and Continental were acquitted.

Recently, Crown caused all its existing dealer contracts and leases in the State of Virginia to be cancelled and announced its intention to convert existing gasoline stations in the State of Virginia to company-owned stations which will enable it effectively to control the retail pricing of Crown gasoline in that state. *Amici* believe in the event that the statute precluding company ownership of gasoline stations in Maryland is not upheld, Crown will endeavor to restore its control over the pricing of Crown gasoline in Maryland by terminating the leases of *amici* and the leases of other Crown dealers in Maryland and converting their stations to company-owned and operated stations.

Counsel for *amici* represented the plaintiffs in the *Phillips* litigation in the United States District Court for the District of Maryland and *amici* believe they are in a position usefully to supplement the legal arguments to be presented by the Attorney General of Maryland in support of the validity of the statute under attack by familiarizing this Court with the pertinent legal authorities and literature relating to the commercial setting against which the Maryland statute was enacted.

For these reasons, it is respectfully requested that the motion of these retail lessee-dealers in gasoline products to file a brief *amici curiae* in support of appellee be granted.

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INTEREST OF AMICI CURIAE

The interest of *amici* has been set forth in the foregoing motion to file this brief.

STATEMENT OF FACTS

Amici Curiae are retail lessee-dealers in Crown Central Petroleum Corporation gasoline products. Their

supplier has been found, by the United States District Court for the District of Maryland, to have engaged in an unlawful horizontal price-fixing conspiracy with other competing suppliers of gasoline including appellants herein Ashland Oil, Inc. and Petroleum Marketing Corp., and also Amerada Hess Corporation and Meadville Corporation. *Phillips, et al. v. Crown Central Petroleum Corporation,* 395 F. Supp. 735 (D. Md. 1975), appeal pending.

Appellants Ashland and PMC and Kayo Oil Company; the marketing subsidiary of Appellant Continental Oil Co. together with Hess, Meadville and others were indicted on June 1, 1976 by the United States grand jury for the District of Maryland on similar charges of horizontal price-fixing in violation of Section 1 of the Sherman Act, a conspiracy involving approximately seventeen billion gallons of gasoline valued at some four billion dollars. (A companion civil suit was also filed.) *United States v. Amerada Hess Corp., et al.,* Crim. No. 76-0314 (D. Md., 1976) C.C.H., Trade Reg. Reporter ¶45076. The indictment charged that the defendants, from at least as early as 1967, until November, 1974, in the States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and the District of Columbia, "conspired to do, among other things, the following:

> a. Used . . . a clearinghouse for gasoline pricing information in order to coordinate price increases and to eliminate discounts and settle pricing disputes.
>
> b. Telephoned or otherwise contacted one another to exchange and discuss current and future retail gasoline prices.
>
> c. Telephoned or otherwise contacted one another to coordinate price increases.
>
> d. Telephoned or otherwise contacted one another to eliminate discounts in the form of price reductions or the granting of premiums.

> e. Telephoned or otherwise contacted one another to police the agreement and secure adherence to agreed upon increased prices; and
>
> f. Met . . . and discussed pricing strategy, including the coordinated increase of retail gasoline prices and the curtailment and elimination of price cutting and discount practices."

After a three month trial, on August 30, 1977, appellants Ashland, PMC, Kayo and others were convicted by a jury in the United States District Court for the District of Maryland and subsequently were sentenced to the maximum criminal penalty provided by the antitrust laws. Crown and Kayo's parent, Continental, were acquitted. These same three appellants, whose unalloyed beneficial effect in the marketplace seems open to question, seek now to invalidate a state law one of the effects of which is to protect the public from the maintenance or increase of control by them of retail gasoline pricing through the elimination of independent lessee-dealers.[1]

In the *Phillips* case, *supra*, the District Court found also that *Amici's* supplier Crown had engaged in unlawful vertical price-fixing by imposing upon its lessee-dealers resale prices chosen by Crown. In its opinion, the Court cited this Court's opinions in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951) and *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964) and noted:

> "A wholesaler like Crown must make a clear cut choice when deciding whether or not to switch from company operated to dealer operated stations. If such a company owns and operates its own

[1] Two other appellants (Gulf and Exxon) pleaded *nolo contendere* (and entered into consent decrees in allied civil cases) in *United States v. American Oil Co.,* Cr. 153-65 in the United States District Court for the District of New Jersey, a case involving alleged horizontal and vertical gasoline price-fixing in the States of New Jersey, Pennsylvania and Delaware.

> stations, it may itself set its retail prices without committing a per se violation of the Sherman Act. If it leases stations to independent dealers, it must leave the determination of the retail prices to the unfettered discretion of the dealers. *Coercion of any kind is not permitted, whether by written contract or oral threats, because a coerced agreement to fix prices cripples the freedom of traders and thereby restrains their ability to sell in accordance with their own judgment.*" 395 F. Supp. at 761 (Emphasis supplied).

Subsequent to the trial of the *Phillips* case, Crown threatened to terminate all its subsisting dealer contracts in the State of Virginia (E. 177) thereby restoring to itself the control over retail prices denied it by the Sherman Act where an oil company does business through independent dealers. Because of the effectiveness of Section (B) of the law under attack, Crown has been unable to do in Maryland what it planned in Virginia and has thus been unable to circumvent, in the marketplace, the effect of the judgment of the United States District Court for the District of Maryland in *Phillips v. Crown Central Petroleum Corporation.*

The factual materials supporting the judgment of the Court below may be summarized as follows:

A. *The statute was reasonable to promote retail competition, to prevent suppression of "price wars" and to prevent elimination of pressure on producers and refiners to lower wholesale prices.*

The determination by the General Assembly to limit the control by oil companies over retail prices in the gasoline industry was first indicated by its enactment of the Maryland Antitrust Act with its provisions, tracking those of the Federal Sherman Act, against both vertical and horizontal price fixing. See §11-201 of the Commercial Law Article of the Maryland Annotated Code, originally enacted by Chapter 357 of the

Acts of 1972. This general expression of concern with vertical price control in the gasoline industry was carried further when by Chapter 662 of the Acts of 1973, the General Assembly supplemented the Maryland Antitrust Act by enacting the Gasoline Products Marketing Act which was further strengthened by Chapter 852 of the Acts of 1974, enacted almost simultaneously with the law here under challenge. Chapter 854 of the Acts of 1974. Section 11-304C of the Commercial Law Article, part of that Act, provides that "the distributor [defined as a person who engages in the sale, consignment or distribution of gasoline products through retail outlets which he owns or leases] may not set or maintain or attempt to set or maintain the price at which the dealer sells any product, and the price of any product may not be subject to enforcement or coercion by the distributor in any way. However, the distributor may counsel with the dealer concerning prices and may suggest prices to him." The Revisor's Note to this section notes the legislature's intention to apply the provision "even in situations where the Maryland Fair Trade Act might otherwise permit the setting of resale prices" By Chapter 608 of the Acts of 1975 the divestiture provisions of Chapter 854 were revised to guard against evasion of them. Subsequently, by a Chapter of the Acts of 1976 the Maryland Fair Trade Act was repealed.

As long ago as 1948 it was urged that:

> "The key to an effectively competitive reform of the petroleum industry is therefore the separation of the major companies into separate units controlling their four chief functions, production, transportation, refining and distribution and the further horizontal division of some of the dominant units which would survive a vertical distribution of the great companies."

Rostow, *A National Policy for the Oil Industry* (1948) at 118. The same work then urged, nearly thirty years ago:

> "[E]xtending the principle of the commodities clause of the Hepburn Act to all common carriers, including pipelines and tankers. The commodities clause policy prohibiting the same business from operating in different lines, where such quality of operations might threaten the competitive character of either market — has been found desirable in other fields presenting comparable problems: in commercial and investment banking, in air, ocean and rail transport, in the relation of airlines to plane manufacturing, and in a variety of other cognate situation." Id. at 120.

The structure of the industry was described in 1948 as follows:

> "The tieing arrangements in the field of wholesaling have their counterparts at the retail level, both as to jobbers and service station outlets. Here the legal forms take on more variety and ingenuity, not alone because of the Clayton Act, but for other legal reasons: to avoid coverage under the National Labor Relations Act, the Fair Labor Standards Act, or the Social Security Act; to minimize income taxation or escape chain store taxes. It is now common to have the filling station nominally owned by its operator but controlled in fact by the major company supplying gasoline, through complicated double leases, or other elaborate procedures for avoiding the obvious.
>
> The net result is the organization of a vast market around the polarizing position of the major companies — five to sixteen in each consuming market, the modal number being eleven — selling a uniform and standardized product through tied outlets of various kinds, except for a small carefully watched flow of gasoline sold as private brands, and in part produced by independent refiners. The large forces of potentially independent and competitive units in the industry are thus mobilized into regiments wearing the uniform of one or another of the major companies. So

> equipped, they march in step, following the price policy of the major companies. The competitive potential of the market is transformed. Every member shares to a lesser or greater degree the profits of a monopolistic price policy. In fact, the market consists not of many separate dealers and jobbers, but of the few major company phalanxes combining large numbers of scattered sellers into effectively disciplined units." Id. at 75-76."

The recent antitrust proceedings have threatened the existence of these "phalanxes" by making independent dealers independent in fact as well as in name. Chapter 854 of the Acts of 1974 had as its purpose preventing the restoration of the earlier situation by preventing replacement of independent dealers by company-owned stations.

The writers of DeChazeau and Kahn, *Integration and Competition in the Petroleum Industry* (1959) at 298-99 perceived the existence of considerable competition in the retailing of gasoline, noting the breakdown at that time of the means by which major oil companies controlled retail pricing:

> "25 years ago the major oil companies not only owned but operated enough service stations so that their own retail price postings complimented and reinforced their price leadership at the wholesale level. . . . Today, instead, only a few integrated firms like Standard of Ohio and Standard of California own and operate any sizable number of stations. There are other ways — notable among them fair trading and consignment selling — by which refiners can exercise direct, legal control over the service station price; there has been increasing resort to such methods in recent years . . . Still it is generally the case that the retail prices are set by at least partially independent reactions of individual station operators to the prices charged by their competitors."

It has recently been noted that:

> "It seems to be sufficient from a control standpoint for the major oil companies to own most of the better locations and to use independent dealers to operate their facilities. Since the dealer does not own the location his bargaining power is practically nil and his behavior can be directed in large part by the actions of the major oil companies, which use a variety of techniques to bring about conformance to the operating procedures they feel to be important to their own performance. The key aspect of the major oil companies' control over their dealers' operations is the short term lease contract given dealers. Throughout the 1960's most dealers operated under one year lease contracts with 30 day cancellation clauses for infractions of the contract. The short-term nature of the contract puts dealers in the position where they realize that unless they generally operate in the manner prescribed by the major oil companies they run considerable risk of not having their contracts renewed when they expire. This gives the major oil companies considerable power since dealers often have big personal investments in time and effort building their businesses and also a financial investment in parts and inventory which are primarily of value to a going business."

Allwine and Patterson, *Competition, Ltd: The Marketing of Gasoline* (1973) at 46.

The period since 1973 has seen the breakdown of the consignment and fair trade devices by which prices might be partially controlled by oil companies as well as impairment of their control over dealers through short-term leases.[2] In consequence, there has been increased interest by the oil companies in company operation of gasoline stations. Enactment of Chapter 854 of the Acts of 1974 was a reasonable reaction by the

[2] Appellant Phillips Petroleum under pressure from the Federal Trade Commission has recently agreed to abandon use of this device and accord long-term leases to its dealers. CCH Trade Regulation Report ¶ 20716 (1974).

General Assembly to the possibility that competition at the retail level in the pricing of gasoline with its benefits to the consuming public, would be eliminated by this means.

Company witness after company witness in this action acknowledged that a major inducement to company operation of stations as distinct from operations of stations by independent dealers was not the greater economy of such operations but rather the fact that company operation made possible company control of the ultimate resale price. See the testimony of Mr. Harvin of Exxon (E. 340); the testimony of Mr. Chandler of Continental (E. 357); the testimony of Mr. Ferguson of Petroleum Marketing Corporation (E. 451-52) and the testimony of Mr. Luellen of Ashland (E. 508).

It was also clear that the state does not entertain delusions in believing that there was a real and present danger that an increasing number of major oil companies intend to supplant independent dealers by company operated stations. BP Oil Company converted all of the dealerships in the state to company operation in 1973 (E. 764). There was a statement in the record indicating that Appellant Gulf Oil Company had plans to phase in 22 company-owned stations in place of self-service stations (T. 252). An announcement by Crown Central Petroleum Company made part of the Motion of Amici Curiae for Leave to Appear in the Circuit Court (E. 177) indicated that Crown Central Petroleum Company had declared its intention to convert all its gasoline stations in the State of Virginia to company operation as a means of accomplishing resale price control denied it by the antitrust laws where dealer operation was utilized.

There was testimony in the record that BP, following the acquisition of its stations by Sohio, reproduced in

Maryland Sohio's characteristic methods of operation and that this example was being given careful consideration by other companies including Gulf and Exxon. Dr. Patterson, the expert witness called by the State, noted that one danger of integrated ownership of gasoline stations was that it permitted major oil companies to punish price competitors. Similarly the testimony of Mr. Luellen of Ashland made clear that when shortages of petroleum produces occurred, gasoline stations directly owned by the oil company were not placed on allocations although independent dealers and distributors purchasing from Ashland were told that if they exercised their prerogative to purchase elsewhere at lower prices they would not be resupplied by Ashland and were likewise placed on allocation (T. 425-27) (partially reprinted at E. 514).

The record below, a record almost entirely made by the oil companies themselves, amply revealed also that the legislature might reasonably believe that one effect of company operation of stations was to remove pressure upon oil companies to grant concessions at the wholesale level by removing pressure for voluntary allowances and other concessions from independent dealers. Thus in speaking of company operation Mr. Harvin of Exxon, after conceding (E. 328) that dealers could frequently make a profit where the company could not and that unprofitable company stores were frequently converted to dealer operation (E. 327-29) stated that company operation of stations nevertheless had countervailing advantages:

> "This strategy is economically attractive when we consider the influence of proper retail practices on our wholesale and down stream profits" (E. 329).

Similarly another witness, Charles J. Luellen, a group vice president of Plaintiff Ashland stated that non-controlled customers were viewed as less desirable because:

> "We have no contracts with them and there is no written contracts with them; and so those people can leave us at any time and frequently over the years they have left us for various reasons but most frequently to avail themselves of lower price . . ." (E. 504).

Mr. Luellen also testified that there were advantages to Ashland, a producer and refiner whose crude was acquired at a higher cost than that of other major oil companies, due to the ownership of controlled stations:

> "Q. Mr. Luellen what is the significance of the fact competitively to Ashland that during that period of time [of shortage] it experienced a crude cost disadvantage in the area of two to three dollars per barrel? A. Well, the penalty, of course, resulted in the fact that we had to attempt to get our prices up, our refined product prices up sufficiently to pass through that — those cost increases.
>
> Q. Now, Mr. Luellen, do company-operated stations permit Ashland to offset in part these disadvantages of crude acquisition? A. Yes sir. By protecting us from loss of substantial volumes of uncontrolled business." (E. 506).

Thus Ashland, for example, favors direct ownership of retail stations for a classic reason advanced by members of cartels — to protect itself, as a high cost producer, from erosion of its market share.[3]

One of the expert witnesses called by the Plaintiffs, John H. Lichtblau, similarly testified as to the desire of oil companies for controlled stations because of the

[3] Mr. Luellen also revealingly asserted that the competition faced by his company was not competition from major oil companies operating through dealers but from other oil companies marketing through company-owned stations at prices approximately 3 cents per gallon under the prices of major oil company dealer stations. The vigor of the competition pointed to by Mr. Luellen as justifying company operation is perhaps open to question, in view of the recent criminal price fixing convictions of petitioners Ashland, PMC, Kayo and others who do business, in whole or in part, through company-operated stations.

tendency of other accounts to demand price concessions. Controlled stations were said to be desirable because they "assure you of a continuous steady market" (E. 531). Uncontrolled stations and distributors by contrast were troublesome: "because of a fraction of a penny a gallon he may leave you and go to someone else" (E. 531). Mr. Lichtblau also revealingly testified that it was very difficult to trace the origins of price wars, that price wars sometimes permanently reduced prices, and that major oil companies (which of course have had to operate almost entirely with independent dealers hitherto) frequently start price wars (T. 472-74) (omitted in extract).

The most highly rewarded of Plaintiffs' extraordinary gallery of well rewarded witnesses, Professor Theodore Levitt of the Harvard Business School[4] acknowledged that company operation meant the elimination of potential price makers (E. 398) and that the number of independent competitors in a market had something to do with the outcome (E. 401-02) and that company owned stations meant there were fewer decision points (E. 401-02). Similarly Professor Charles H. Berry, another of Plaintiffs' experts, though perceiving no immediate danger in company operation of stations, acknowledged that a competitive market must have many competitors (E. 441). Yet another expert called by Plaintiffs, Professor Marcus of Rutgers, similarly noted that it was "very important to have a good number of participants" (E. 492).

[4] On being advised that Professor Marcus, a Shell witness, has received only $450 per day for his 25 or 30 days of service to the Plaintiffs (E. 483-84) Judge Childs observed "Professor Marcus, I realize it's not up to a judge to give advice, but if I might offer one suggestion, you might find it well to contact Professor Levitt's agent in the future." (T. 387). Professor Levitt received $1,600 per day for his 20 to 25 days of service (E. 391).

A leading study of the origins of gasoline price wars has noted the contribution of independent non-integrated gasoline dealers to them:

> "Conventionally, price rigidity is associated with the 'kinked' curve model. That is, it is held that members of an oligopolistic group are anxious not to disturb an existing equilibrium situation, and thus they will tend to maximize joint profits, and to divide these profits according to some predetermined arrangement. *Such a view implies either fully integrated or nearly perfectly coordinated channels.* However, non-integrated channels are only imperfectly coordinated, and the interdependence of price decisions involves not only a group of sellers at a single channel stage, but sellers in markets at various levels. Policy agreements within a channel are difficult to achieve, and there are many problems of determining demand and cost at various channel stages. Hence, it is difficult to arrive at a fixed channel price structure which might be acceptable to all channel members. Moreover, if a final agreement could be reached between each seller and his respective channel members, there is no assurance that the resulting price structures would be the same for each seller. Even if complete agreement could be reached, both among sellers and within their respective channels, the resulting equilibrium situation need not be stable. The case study has shown clearly that the behavior of some members of one seller's distribution channel may be sufficient to destroy an existing industry equilibrium situation."

Dixon, *Suppliers' Pricing Policies and Gasoline Wars in Pennsylvania* (1966) at 56-7 (emphasis added).

The testimony of Mr. Harvin of Exxon was likewise clear that his company planned increased use of company owned operations. He testified that the trend in recent years has been to multi-pump island stores with limited service (E. 306) in which the company makes the decisions as to what is offered (E. 307); that his company had commenced operation of company

operated self-service locations (E. 311) and that it sold gas obtained on exchange from BP through a newly established Alert chain (E. 334). The purpose of company operation of the Alert stations was price control since absent company operation "there are antitrust laws which would prohibit Exxon from being able to control the price of gasoline" (E. 340) Exxon intends to operate more self-service stations (T. 112) (omitted in extract).

Mr. Ferguson of PMC, who extolled the benefits to the public of company operated low-service stations, explained that benefit as follows:

> "We are approximately 2¢ below major brand competition. This varies of course, from station to station, but I think on an average we are probably 2¢ to 2.2. It might be 1.7 for the moment and I think that pricing in marketing is the thing at the moment, but so far, on the average I would say that we are from 1 to 2¢ below major competition and I mean to say those offering full service, bays, tire repairs, batteries and so forth. Since we don't offer this type of thing we are gas, easy in, easy out type of operation" (E. 451-52).

Although the oil companies were vociferous in their claims that this type of company operation was such a great benefit to the public that the Maryland General Assembly could not constitutionally take action which would limit company operation of gasoline stations, the General Assembly was certainly justified in reaching an opposite conclusion. Apart from the aforementioned result of the recent criminal case and the private civil case that preceded it, testimony of the oil companies' own witnesses, as noted, justified the General Assembly in a belief that permitting company operation would significantly reduce the number of price setting centers and active competitors in the market and would relieve pressures upon oil companies to reduce wholesale prices. The evidence presented by the oil companies was

also striking and clear that the use of self service and gas only stations was not an innovation pioneered by company operated stations. See the testimony of Mr. Harvin of Exxon (E. 313). Similarly it was conceded that the integrated companies making greatest use of company owned stations at best matched competition and were "price takers" rather than "price makers". See the testimony of Mr. Ferguson of PMC (E. 462), and Mr. Lichtblau, an expert witness called by Ashland (E. 530). The testimony of the state's expert, Professor Patterson, was to similar effect (E. 589-90, 629). He similarly testified that most innovations were by non-integrated marketers (E. 591-92).

Taken in all, even on a record made almost entirely by the oil companies, it is apparent that the General Assembly was justified in believing that the benefits of company operation by integrated refiners were offset by loss of a number of price setting centers in the market, reduced pressure by independent dealers on wholesale prices, the dangers (exemplified by the *Phillips* case and the recent indictment in Baltimore) that competition might be eliminated by means of conspiracies between a relatively small number of price setting companies, the fact that integrated refiners operating company owned stations have not been leaders in innovation and have been at best price takers rather than price makers, as well as the substantial evidence that dealer operation was, in general, a lower cost form of operation. The act requiring divestiture was a reasonable means of guarding against real dangers to competition which would arise from increased company owned operation.

B. *The legislation was reasonable as a means of limiting the possibility that company ownership of stations might be used to control the pricing practices of independent dealers.*

The utility of directly owned gasoline stations as a means of dealer control has long been recognized:

> "The major oil companies do not solely rely upon personal communication between the dealer and the sales representative to closely control dealer operations. Some companies set the pattern of operation for their dealer by actually competing with them through strategically located company operations. In such cases it becomes a matter of not only 'doing as I suggest' but 'doing as I do'. Two companies that use relatively large numbers of company operated stations that frequently set the pattern for the dealer operations are Standard Oil of California and Sohio."

(Allwine and Patterson, *Competition, Ltd: The Marketing of Gasoline* (1973) at 46-7.

Professor Patterson testified at trial:

> "The increased direct operation of service stations will first permit the immense windfall profits of the crude price increases of vertical integrated major oil companies to be focused more effectively on the price competitor" (E. 594).

Further:

> "The financial power of the integrated firm can be focused through those price supports on firms-non-integrated firms making trouble by cutting prices and trying to take a bigger share of the market (E. 596).

Dr. Patterson further testified as to the dangers of company operation which "creates a power to discipline by using specific price reductions in only those stations in face to face competition with the price marketers" (E. 608-10, 627).

Further, apart from such specific use of the power to reduce prices at company owned stations, permitting company ownership leaves dealers under the more general threat that, in the event that they do not comply with company pricing desires, their leases will be cancelled and a conversion to company operation of the sort undertaken by BP in Maryland and Crown in Virginia will follow.

C. *The legislature might reasonably believe that the availability of gasoline supply to independent "price marketers" would be reduced, to the detriment of competition, if company ownership of stations was permitted.*

All the expert witnesses were in general agreement that the integrated company-owned stations were at best price takers rather than price makers and that some of the most vigorous price competitors in any gasoline market are chains of stations not affiliated with a producer or refiner. Thus Mr. Ferguson of PMC conceded that it was his company's practice as an integrated company to match competition and not to lower existing levels of price (E. 462). Mr. Lichtblau, called on behalf of Ashland, made a similar concession with respect to the practices of that company (E. 530). A survey of major oil companies conducted by the Governor introduced in evidence by the state indicated that during the period of shortage following the oil embargo, the supply of gasoline to independent dealers and distributors by the integrated companies was dramatically impaired, while the flow of gasoline to stations owned by such companies was effected only to a limited degree, if at all (E. 698-704). The testimony of Mr. Luellen of Ashland with respect to the activities of his company during this period was to substantially similar effect (T. 425-27, partially reprinted at E. 514). The state's expert witness, Dr. Patterson, extolled the

role of independent marketers as promoters of price competition:

> "The sole source of price competition in the marketing of gasoline comes from the competition between types of marketers, namely the private brand and non-integrated marketers and the major brand marketers; and it is this intertype, between type, competition that the two paragraphs of the law tend to enhance" (E. 588-89).

Dr. Patterson further testified:

> "The major marketer has a heavy investment and a particular form of distribution, he is closely intertwined with his competition through exchange agreements and joint ventures. The nature of that form of competitive relationship is one which makes price competition too aggressive and in a sense self-defeating so that they would be motivated not to use price because of the structure of the market and their relationship would be by themselves. On the other hand the smaller less committed more flexible non-integrated private brand marketer finds that the principal weapon at his disposal is price and he understands his position as being one where he is probably able to get away with cutting price, not be clobbered immediately; and the result is that he finds in his situation price cutting the price to be a much more effective marketing instrument than either the integrated refiner marketer who sells at a discount but who doesn't try to extend that discount and the major brand marketer who finds that his situation is such that to use the price is self-defeating as a primary marketing competitive tool" (E. 589).

Dr. Patterson distinguished between the pricing conduct of independent marketers and the pricing conduct of integrated companies such as Ashland who are deficient in supply and accordingly dependent upon other oil companies for supply:

> "The integrated refiner marketers who are — who tend to market at a discount — also find it in their interest not to be aggressive in price. They tend to be, if you will, passive price takers. They are not rich enough, strong enough or adequately enhanced with economic rent from the crude level to justify the investment in branding and in the major kind of marketing, but nevertheless they are so closely interconnected with their major competitors that they find that aggressive price competition is not the most profitable route for them to take. They are too big, too interdependent to use price. The only marketer who can use price in this industry is the one who thinks he can get away with it by virtue of his independence and by virtue of his smallness and by virtue of his geographical diversity." (E. 590).

The 1974 statute contains no provisions which would in any way prevent marketers not affiliated with major oil companies from continuing to operate in the state. Such marketers as Penney, Sears, Fisca, Homes and Giant remain free to operate. As was conceded by Ashland's own witness, Mr. Lichtblau (T. 466), Mr. Patterson testified that the growth of company-owned major stations would tend to decrease the quantity of gasoline available on the "spot" market to independent marketers, thereby reducing their ability to compete and, to enter the Maryland market (E. 594, 627, 634-5, 637-39). This perception of the tendency of integrated companies to favor their own stations in periods of shortage at the expense of independent marketers was fully confirmed by the testimony of Mr. Luellen of Ashland and by the results of the Governor's survey.

Although substantial testimony was adduced by the oil companies as to the alleged ease of entry into the gasoline station business, it was conceded by Professor Berry, one of their economic experts, that vertical integration can be a barrier to entry by requiring a new entrant to the business to enter at two levels (E. 439), both marketing and refining.

Much stress was laid by the Plaintiffs on the fact that the statute as written might preclude "backward integration" by independent price marketers. However no substantial testimony was adduced as to the ease of such backward integration and the state's expert Dr. Patterson testified as to its unlikelihood (E. 639):

> "Operating a refining system without, you know, clear favorable access to crude is a tough proposition and it is not an attractive proposition that invites a number of investors to come it" (E. 639).

The General Assembly was entitled to believe that any hypothetical loss to competition from creation of a condition in which independent marketers would have to divest their stations if they opened refineries was more than offset by the loss to competition which would result from the reduction in the free supply available to independent marketers from increased company ownership of gasoline stations.

ARGUMENT

This case has been distinguished by the chameleon-like nature of the claims asserted by the plaintiffs. The case began as an action instituted in Maryland State courts predicated on the primary assertion that the acts under challenge were beyond the police power of the Maryland legislature. A variety of federal constitutional arguments were thrown in as makeweights and the absence of any significant federal due process question was all but conceded. Both the State trial court and the Court of Appeals of Maryland firmly rejected the contentions founded upon the commerce clause that are so strenuously advanced by plaintiffs in this Court.

Upon its arrival in this Court the police power-due process questions have all but disappeared, indeed only one of the plaintiffs raises them and the briefs of at least one other plaintiff impliedly concedes the frivolousness of the due process contentions under present

law (Brief of Ashland, et al., at 38). Both courts below found against plaintiffs on the commerce clause question (see Joint Appendix to Jurisdictional Statements) and their determinations come here freighted with the strong presumption arising from the so-called "two-courts rule", see Hart and Wechsler, *The Federal Courts and the Federal System* (1st Ed. 1953) at 1390-92. See also Robert L. Stern [of counsel for plaintiff Exxon, et al. here], *Review of Findings of Administrators, Judges and Juries,* 58 Harv. L. Rev. 70, 89-90 (1944). Appellants also sought to engage the interest of this Court by emphasizing in their jurisdictional statements claims founded upon alleged conflicts between the Maryland statute and the Robinson-Patman Act[5] which were the subject of summary judgment and not tried below.

[5] As it is acknowledged in brief of Plaintiff Ashland Oil, Inc. et al., Plaintiff Continental Oil Co. has refrained from challenging subsection (d) as in conflict with the Robinson-Patman Act.

None of the parties to these consolidated appeals challenge in this court the validity of the Maryland Act in its relation to the Federal Emergency Petroleum Allocation Act or the Lanham Act, questions raised by certain amici curiae. The Lanham Act question was not raised below and is raised here by an amicus, not a party. Although questions not decided below may be invoked by this court to uphold a lower court decision, see *Dandridge v. Williams,* 397 U.S. 471 (1970), and authorities there cited, such questions scarcely may be invoked to overturn a determination of a lower court, given the appellate nature of this Court's jurisdiction. Subsection (f) of the Maryland Act was as plaintiffs Exxon et al. concede (Brief of Exxon, et al. at 50) construed by the court below as having the same meaning as the Federal Emergency Petroleum Allocation Act and plaintiffs have therefore not questioned its validity here. The so-called Lanham Act question rests on a contention that the Act somehow protects the right to operate a system founded upon maintenance of a uniform resale price, an oft-rejected proposition. See *Puritan Sportswear Co. v. Shure,* 307 F. Supp. 377, 390-91 (W.D. Pa. 1969); *Sunbeam Corp. v. Wentling,* 192 F.2d 7 (3rd Cir. 1951); *Clairol, Inc. v. Gillette Co.,* 270 F. Supp. 371, 380 (S.D.N.Y. 1967).

It is not surprising, given the character of the response to the jurisdictional statement filed by the State, that this Court noted probable jurisdiction of this case, for the State's response constituted a response on the merits to the Robinson-Patman Act claims raised by plaintiffs. Further consideration will make plain to the Court what the State's brief did not, viz, that the Robinson-Patman Act question, interesting though it may be, is wholly unripe for decision. The commerce clause and due process claims are without substance. Affirmance of the judgment below is therefore plainly required.

I.

CONFLICT WITH THE ROBINSON-PATMAN ACT IS CLEARLY NOT ESTABLISHED ON THE PRESENT RECORD.

The Court below rejected plaintiffs' claims founded upon asserted conflict between subsection (d) of the Maryland statute and the Robinson-Patman Act and reversed the action of the circuit court summarily and without trial granting plaintiffs relief against enforcement of subsection (d) of the Act. The issues presented by the *Enterprise, Sun Oil, Sunshine Biscuit* and *Bargain Car Wash* cases are interesting issues but they are patently unsuitable for decision as abstract academic questions on a record such as that here.[6] It has been recognized at least since publication by Alexander Hamilton of the Federalist No. 32 that preemption by Federal enactments is not lightly to be found and that such findings require not:

[6] This is particularly so since, as pointed out in the State's brief, acceptance of the interpretation of the Robinson-Patman Act 2(b) defense tendered by plaintiffs, by legitimizing communication between competitors for "price validation", might seriously compromise the basic Sherman Act rule against horizontal price fixing. See *United States v. United States Gypsum Co., cert. granted* 46 U.S.L.W. 3182 (1977).

> "a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of sovereignty."

As there noted, state powers are to be held superseded only if continued authority in the State would be:

> "absolutely and totally contradictory and repugnant . . . I use these terms . . . to distinguish this . . . case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority."

This very language "absolutely and totally contradictory and repugnant" was invoked by the Court in *Goldstein v. California,* 412 U.S. 546, 553 (1973) as defining the contemporary preemption standard.

The Brief of Champlin Petroleum Company, et al., *amici curiae,* urges that there is applicable here not the constitutional standard of "actual conflict" outlined by Hamilton but a standard of "potential conflict" derived by the writer of that brief from the case of *Rice v. Santa Fe Elevator Corporation,* 331 U.S. 218, 231-32 (1947). The "potential conflict" standard of the Rice case however arose from what the Supreme Court referred to as "the special and peculiar history of the Warehouse Act" under construction there, the act containing an express provision to the effect that "the power jurisdiction and authority [of the Secretary] . . . shall be exclusive with respect to all persons". No such provision appears in the Robinson-Patman Act. Under these circumstances the applicable preemption standards are provided not by *Rice v. Santa Fe Elevator Corporation* but by a companion case decided by the Supreme Court on the same day in which the opinion of the Court was

also written by Mr. Justice Douglas, the author of the *Santa Fe* opinion. In *Rice v. Board of Trade,* 331 U.S. 247 (1947) the Court noted "there is not contained in the Commodity Exchange Act, as there is in the United States Warehouse Act, . . . a declaration by Congress that the system by which it has adopted for the regulation of trading on contract markets is exclusive of state regulation." (at 253). This Court therefore, concluded, in *Rice v. Board of Trade*:

> "Respondents' claim of supersedure is, therefore, premature. Until it is known what rules the Illinois commission will approve or adopt, it cannot be known whether there will be any conflict with the Federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the Federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it." (331 U.S. at 252-56).

What was said in the *Board of Trade* case by Mr. Justice Douglas for a unanimous court is in full accord with this Court's contemporary approach to preemption problems. In *New York State Department of Social Services v. Dublino,* 414 U.S. 405, 413 (1973) this Court stated:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

This case is held by commentators to have eclipsed whatever remains of this Court's holding in the *Rice v. Santa Fe* case. See Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Columbia Law Review 622, 645-46 (1975). In *Jones v. Rath Packing Co.,* 340 U.S. 519 (1977) this court reaffirmed that "This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied not merely as they are written." (51 L. Ed. 2d at 614). The lack of any actual as distinct from potential conflict between the Robinson-Patman Act and the provisions of subsection (d) is patent here. Leaving to one side the fact that the Comptroller is accorded by the Maryland Act rule making power to clarify or mitigate any possible areas of conflict, the potential areas of conflict pointed to by plaintiffs seem far fetched in the extreme. The complaint that the state-wide voluntary allowance uniformity revisions of the Maryland Act may compel primary line price discrimination prohibited by the Robinson-Patman Act assumes that a state wide voluntary allowance would be characterized by the federal courts as a price discrimination rather than price reduction. It also assumes that such a reduction would give rise to injury in fact to competition, requisite to Robinson-Patman Act liability for primary line price discrimination. The similar contentions made with respect to secondary line price discrimination based on conflicts at state borders, assumes that such problems will in fact arise and that such problems will not be mitigated or offset by either regulations of the Comptroller or different tax levels in the two jurisdictions. Given the recognition by the Federal Trade Commission in a Robinson-Patman enforcement proceeding that "no matter what area may be chosen there will also be fringe or peripheral effects on the border line of such areas between customers within the area and customers without" *Pure Oil Company,* FTC Docket 6640 (1959), the potential for real conflict is theoretical in the extreme. It is also important to note that the legislative history relied by amici Champlin Petroleum

Company, et al. (at 18) relates to the circumstances in which a local manufacturer's sales to a local purchaser may be within the Robinson-Patman Act and not to the question whether state lines may be validly held to separate geographic markets where state regulations are different.

The very cases under the Robinson-Patman Act relied upon by plaintiffs make clear that a decision as to conformity or conflict with the act is improper on the present record. In *Bunty v. Shell Oil Co.,* 1972 CCH Trade Cases ¶74252 (D. Nev. 1972) there were extensive findings as to trade areas and as to the extent of allowances granted by competitors. *Covey Oil Company v. Continental Oil Company,* 340 F.2d 993 (10th Cir. 1965), *cert. denied* 380 U.S. 964 (1965) involved reversal of motions to quash subpoenas. The discovery requested was allowed on the basis that information as to facts in the market was necessary to adjudication of the Robinson-Patman claims. In *Belliston v. Texaco, Inc.,* 455 F.2d 175 (10th Cir., 1972), *cert. denied* 408 U.S. 928 (1972) the court recognized that there was need for actual information as to competing prices before a section 2(b) defense could be successfully invoked to a Robinson-Patman Act claim.

In the present case the plaintiffs seek to use section 2(b) of the Robinson-Patman Act as a sword, rather than as a defense, and attempt to assert its provisions in a factual vacuum.

This is not the first case to challenge a state act directed against price discrimination on the basis that it does not fully recognize defenses directly available under the Robinson-Patman Act. In *State of Wisconsin v. Texaco, Inc.,* 1961 CCH Trade Cases ¶71153, the Supreme Court of Wisconsin dealt with a similar challenge. The majority opinion in that case stated:

> "Conflict between the federal and state statutes, if any, cannot be considered in the abstract. . . . Until this court knows what the facts are, it cannot determine whether a conflict if any exists. The question of conflict is moot until it is presented in a factually concrete manner. Because of the alleged conflict with the Robinson-Patman Act it is of the utmost importance that the pertinent facts be brought as fully into the record as possible before a decision is reached . . . This state is not precluded from the exercise of its police power on the mere possibility that a conflict of jurisdiction exists with the federal government; such conflict must be factually verified."

Judge Fairchild, concurring, observed:

> "Let us assume that as Texaco claims there may be acts of price discrimination under circumstances such they would be unlawful under the Wisconsin regulation but lawful, by reason of the good faith meeting competition defense, under the federal act. Let us also assume that this is the type of conflict which must not exist under the supremacy clause. Texaco would avoid the conflict by suspending the entire Wisconsin regulation. It might, however, be possible to avoid it by suspending the Wisconsin regulation only as to transactions where the conflict exists. I am not prepared at this time, simply by looking at the face of the federal act, to say that the Wisconsin regulation is so disruptive of the objectives of the federal act, that it is wholly suspended and inoperative. Particularly because of the complexity of economic regulation, I prefer to reserve judgment until the record before us shows the type of price discrimination being practiced and the extent to which defenses available under the federal act and not under the Wisconsin regulation can be proved. Not only will the existence of any conflict then be made more clear, but the record will doubtless prove a better groundwork for evaluation of the substantiality of the conflict."

A decision invalidating state legislation under the supremacy clause is a decision affecting the constitutional distribution of powers between the national and state governments, and the counsels of restraint in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J. concurring) are fully applicable to it. In consequence of the summary judgment granted by the Circuit Court this Court has before it no factual record bearing on the Robinson-Patman Act issues nor the benefit of the expert testimony which the State was prepared to adduce at trial. Nor does this Court know what the terms will be of the implementing regulations to be adopted by the Comptroller of the Treasury of Maryland with respect to the Maryland Act, nor have any enforcement proceedings under the Maryland act with respect to prohibited price discrimination been commenced or threatened. Under these circumstances the claims of plaintiffs relating to preemption by the Robinson-Patman Act are clearly premature and unripe for decision.[7] Cf. Freund, *Umpiring the Federal System*, in *The Supreme Court of the United States* (Meridian Ed. 1961) at 109:

> "Review by the Supreme tribunal ought not be precipitate. Ordinarily it should await the development of a body of evidence illuminating the actual working of the laws in question."

[7] Even if the claims were upheld they would not affect the divestiture provisions of the act. The act is controlled by a severability clause (Code), Art. 1, §23 and the Maryland Court of Appeals at the close of its opinion strongly hinted that it regarded the provisions of the act as severable. The divestiture provisions of the 1974 act were repealed and reenacted with amendments by Chapter 608 of the Laws of Maryland 1975 which related to divestiture only, and thus now clearly stand separate from the price discrimination provisions.

II.

THE DIVESTITURE PROVISIONS OF THE ACT DO NOT VIOLATE THE COMMERCE CLAUSE.

A.

The Divestiture Provisions Are Not Unconstitutionally Discriminatory.

In rejecting the claim of unconstitutional discrimination against out-of-state businesses the Maryland Court of Appeals noted:

> "The Act is equally applicable to all producers and refiners. While oil is not produced in Maryland, and is not presently being refined in Maryland, there are producers or refiners which are Maryland corporations, or are headquartered here, or have substantial facilities here, or do a significant portion of their business here. All such 'Maryland' businesses are prohibited by the Act from operating retail service stations. If a refiner were to build refineries in Maryland, and were to engage in business solely within Maryland, it would be prohibited by the Act from marketing to a company owned station. On the other hand, out of state and Maryland retailers are treated the same. An out of state marketer not engaged in producing or refining may continue to market in Maryland to retail service stations operated with company personnel."

The Act does not discriminate between Maryland refiners and out of state refiners or between Maryland dealers and out of state dealers. As noted in the Brief of plaintiff Ashland at 8 note 9, as of July 1, 1974 there were 36 private brand stations in Maryland operated by 9 companies having no association with a refiner. These stations are undisturbed by the Act, and most of the companies operating them are non Maryland companies, such as Fisca Oil Co., Homes Oil Co., Pantry Pride and Sears, Roebuck & Company. See the testimony of John H. Lichtblau, an expert called by

plaintiff Ashland (E. 533-34). As is stated in the brief of Ashland:

> "Private brand stations are operated by several different kinds of companies. Some are mass merchandisers, such as discount and department stores and food chains. Others are wholesale jobbers, which distribute to retailers and also operate retail stations of their own. Still others are independent marketers, which sell only at retail and have no wholesale operations."

These three categories of private brand stations, many if not most of which are owned by non-residents of Maryland, are undisturbed by the Act. By contrast Crown Central Petroleum Company, according to the Fortune 500 survey the largest industrial corporation of any kind with headquarters in Maryland, is directly affected by the Act, as its brief amicus curiae makes clear, notwithstanding that "its corporate headquarters and principal offices [are located] in Baltimore, Maryland." (Brief of amicus curiae Crown Central at page 1.)[8]

[8] Although neither Crown nor any other oil company presently operates a refinery in Maryland, Crown has, within the last 5 years, proposed construction of refineries at Marley Neck in Anne Arundel County and Hawkins Point in Baltimore City; the Hawkins Point proposal is still under consideration. In addition Steuart Petroleum Company which abortively proposed a refinery in St. Mary's County, see *Steuart Petroleum Company v. Board*, 247 Md. 854 (1975), has proposed a refinery in Somerset County. Likewise, while there is no current production of oil in Maryland, the existence of substantial possible reserves in both Western Maryland and offshore has long been recognized. In consequence Maryland adopted a licensing law relating to oil production by Chapter 88 of the Laws of 1956 and joined the Interstate Oil and Gas Compact by Chapter 390 of the Acts of 1959, see Maryland Code Article 66(c), Section 675 through 689(c). There are a substantial number of oil and gas leases in Western Maryland, see *Bureau of Mines v. George's Creek*, 272 Md. 143, 151-52 (1974). Following this court's decision in *United States v. State of Maine*, 420 U.S. 515 (1975), the Department of Interior invited bids for oil leases off the Maryland coast, which are scheduled to be opened in early 1978, and Maryland by Chapter 673 of the Act of 1975 enacted a coastal facilities review act, Section 6-501 of the Natural Resources Article, relating to the imminent construction of crude oil pipe lines, production terminals and refineries. Given this widespread current interest in Maryland's oil resources by producers and refiners, the possibility of unreasonable regulations was clearly "alleviated by the operation of those critical restraints normally exerted when interests within the state are affected." *Southern Pacific Company v. Arizona*, 325 U.S. 761, 767 note 2, even apart from the fact that plaintiffs each and all have numerous employees in the state, Crown is a Maryland-based corporation, and plaintiffs Exxon and Shell, among others, appeared and testified at the legislative hearings (E. 729-54).

The case of *Hunt v. Washington State Apple Association*, 97 S. Ct. 2434 (1977) does not render the test of the constitutionality of legislative action an inquiry into the motives of the supporters of legislation. Cf. *Breard v. Alexandria*, 341 U.S. at 636, n. 20 (1949). Even if the case were otherwise, however, the legislative history of the Maryland Act makes clear that it was not the product of draftsmanship of dealers' associations but of initiative by the Governor and Comptroller of Maryland supported by studies undertaken by the executive branch of the Maryland government, as is recited in the opinion of the Court of Appeals.

The present act is founded on the premises that vertical integration extending to the retail level results in impairment of free processes of competition in consequence of (1) the more limited number of price setting centers at the retail level, (2) the ability which company ownership of stations confers upon producers and refiners to restrict their distribution of gasoline to stations whose price and practices they control, and (3) the ability which company ownership of stations gives producers and refiners to discipline independent competitors by selective price cuts at company stations in close proximity to competitors. The Maryland General Assembly considered that these ills resulted from

vertical integration irrespective of whether the producer or refiner was Maryland based or not Maryland based, and irrespective of whether refining was carried on in Maryland or out of Maryland. Contrariwise the General Assembly, seeking to insure that all service stations in Maryland were independent of producers and refiners, sought to protect the independence of all service station operations irrespective of whether their operators were Maryland residents or were not Maryland residents and benefited alike the resident of Virginia owning a service station in Maryland, Maryland residents owning a service station in Maryland and the national retail chains such as Sears Roebuck or Fisca owning a retail service station in Maryland. Legislation against vertical integration has long been commonplace at both state and national levels and acceptance of the warmly debated economic arguments for such legislation is not synonymous with a purpose to systematically discriminate against interstate trade.[9]

The contention that the act discriminates against interstate commerce because out of state producers and refiners engage in direct operation in order to gain a toe hold in the Maryland market is also highly unconvincing. Leaving to one side the fact that such direct operation requires capital investment not available to small producers and refiners, the fact remains that the Maryland legislature was not obliged as a matter of

[9] Plaintiffs Exxon, et al. endeavor to find discrimination in the requirement, added by the 1975 amendment to the divestiture law, that stations "must be operated by retail service station dealers". This requirement does not limit the operations of chains of stations by independent dealers or the residence of dealers operating stations and was designed, together with the preceding language prohibiting "operation by producers or refiners under a contract with any person, firm, corporation, managing a service station on a fee arrangement with the producer or refiner" to guard against evasion of the prohibition against producer or refiner operation and consequent price control by resort to contractual subterfuges.

constitutional law to regard this argument as decisive in the context of vertical integration any more than it is obliged as a matter of constitutional law to rescind its recent repeal of the Maryland Fair Trade Act because some manufacturers believe, not unreasonably[10], that legalized resale price maintenance would assist them in gaining a toehold in the Maryland market. Indeed the briefs of both plaintiffs Exxon, et al. (at 33) and plaintiffs Continental et al. (at 14) concede that Maryland's statute is sought to be stricken because it deprives plaintiffs of "the only way they can practically and legally maintain control over the pricing- . . . practices of their stations" (Continental brief at 14) and because it prevents end of a situation in which plaintiffs "legally . . . cannot control the price of the product sold" (Exxon brief at 33). The short answer to plaintiffs' cries of discrimination is that it does not constitute unconstitutional discrimination in violation of the commerce clause for a state to prohibit price fixing, by vertical integration or otherwise; on the contrary such prohibitions foster a free competitive market.

B.

THE ACT DOES NOT UNDULY BURDEN INTERSTATE COMMERCE

It is plain that the Maryland General Assembly in enacting the divestiture law sought to foster and not impair commerce. The General Assembly feared that allowing company operation would result in a drying up of supply to independent dealers particularly in periods of shortage, a conclusion supported by the Comptroller's report. It also quite reasonably feared a situation in which as a result of the developing practice of company operation which had commenced with

[10] See Telser, *Why Do Manufacturers Fair Trade?*, Vol. 3 Journal of Law and Economics 86 (1960).

actions by BP in Maryland (E. 726) and by Crown in Virginia (E. 177), a state of affairs would arise in which ultimate retail pricing of petroleum products in Maryland was controlled by 15 or 20 oil companies rather than by thousands of independent dealers or in which the pricing practices of company owned stations would be subject to control in order to affect the prices charged by neighboring independent dealers, and in which price wars which place pressures upon major oil companies to reduce wholesale prices of gasoline would be prevented. It has not hitherto been thought that state or federal measures designed to impair resale price maintenance by manufacturers or producers burden commerce. On the contrary, the assumption of this and other courts has been such prohibitions foster commerce. Federal legislation authorizing resale price maintenance has been given a narrow construction by this Court. See *Schwegmann Brothers v. Calvert Distilling Corporation*, 341 U.S. 284 (1951); *United States v. McKesson & Robbins*, 351 U.S. 305 (1956). Numerous decisions by this Court under the Sherman Act do not merely permit vertical divestiture as an antitrust remedy but in some circumstances decree it even where it has not been required by the lower court. Federal and state legislation requiring vertical divestiture has been upheld against challenges founded upon the commerce clause, as has federal and state legislation barring corporations, including foreign corporations, from various activities within states.

Both the brief of Exxon, et al. and that of Continental, et al. concede that a primary interest of the plaintiffs in invalidation of the present Act is the restoration of a legalized means of controlling prices charged at the retail level. (Brief of Continental at 14; Brief of Exxon at 33.) Exxon asserts this interest only vicariously, pointing to its importance to its competitors, Ashland and Continental. Continental and Ash-

land assert this interest directly. Amici curiae supporting them point to the "active competitive role" played by such companies. But the Maryland General Assembly may well have acted with proper scepticism with respect to such claims of active competition in light of the subsequent criminal conviction of Ashland, Continental's subsidiary Kayo and others. Seventy-one of the 95 gasoline stations affiliated with defendants convicted in the recent criminal antitrust case in Baltimore were company operated gasoline stations, these stations constituting nearly a third of the company operated stations in the State of Maryland (E. 189). In addition, amicus curiae Crown Central Petroleum Company, which, although acquitted in the criminal case, was found by a preponderance of the evidence in *Phillips v. Crown Central Petroleum Company*, 395 F. Supp. 735 (D. Md. 1976), to have participated in the same conspiracy, has converted all its stations to company operation in the State of Virginia, and has declared its purpose to similarly act in the state of Maryland. Under these circumstances Maryland's action will not constitute an undue burden on interstate commerce, but on the contrary was designed to prevent plaintiffs in this action from privately imposing such an undue burden.

The 'undue burden' cases relied upon by plaintiffs are cases in which legislation was designed to protect local interests and in which protection of such interests was held to impose an undue burden on interstate commerce. In the present case both elements present in these cases — protection of local interests and burden on interstate commerce — are absent. This is not a case like *Hood v. DuMond*, 337 U.S. 525 (1949) where the effect of a state regulation was to protect Wisconsin dairy farmers against competition from dairy farmers in Illinois and elsewhere by completely barring Illinois dairy farmers from the market, the legislation incidentally barring some Wisconsin farmers also. In the

present case out of state producers and refiners are in no way barred from the Maryland market. They remain free to sell their product in Maryland to independent dealers and retail chains of service stations in Maryland. The oil produced by the out of state producers and refiners may still cross the Maryland State line, unlike the milk produced by Illinois farmers involved in *Hood v. DuMond;* the effect of the Maryland regulation is merely to alter channels of distribution through which the oil is sold.[11]

The other cases relied upon in the 'undue burden' portions of plaintiffs briefs are also each cases of discrimination. In *Hunt v. Washington Apple Advertising Commission,* 97 S. Ct. 2434 (1977), the court stressed the fact that the North Carolina regulation prohibiting the display of apple grades requires the repacking only of out of state apples and thus "has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." Similarly, in *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977), the court also stressed the discriminatory effect of the enactment:

> "The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges . . . the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to her sister states."

[11] Indeed, given the fact that Maryland act does not require the oil companies to dispose of the real estate on which stations are located or the stations themselves, and does not prevent the oil companies from entering into dealership contracts with the company employees presently operating such stations, the practical effect of the Maryland legislation is for the most part merely to make paper legal changes the chief of which is impairment of the producers' and refiners' rights to engage in vertical price fixing.

The statute in *A&P Tea Company v. Cottrell,* 424 U.S. 366 (1976) involving a Mississippi law totally excluding milk from states not signing reciprocity agreements with Mississippi was similarly invalidated because of its discriminatory nature. The court laid stress upon the fact that the challenged regulation "in practical effect excluded from distribution in Mississippi wholesome milk produced in Louisiana" (424 U.S. at 375). Other objectionable features of the regulation, not present in this case, were the efforts by Mississippi "to force its own judgments as to an adequate level of milk sanitation on Louisiana" (424 U.S. at 380), thus projecting its public policy beyond its own frontiers, as well as the absolute nature of the exclusion of the Louisiana milk which was held to "invite a multiplication of preferential trade areas destructive of the very purpose of the commerce clause" (424 U.S. at 380). Similar observations apply to the case of *Polar Ice Cream v. State of Washington,* 375 U.S. 361 (1964) also relied upon by plaintiffs.

The present action is not controlled by these cases but by such cases as *Breard v. Alexandria,* 341 U.S. 622 (1951). There the court in sustaining an ordinance prohibiting door-to-door commercial solicitations notwithstanding that the fact that the ordinance bore most heavily upon businesses with no stores or permanent establishments within the state, noted that, as here:

> "The usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house to house canvassing is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation (341 U.S. at 638)."

The ordinance in *Breard* being nondiscriminatory and applying both to local and foreign solicitors, the fact that it directly regulated interstate commerce did not render it an undue burden, the rule of *Hood and*

Sons v. DuMond being limited to discriminatory regulations:

> "Nor does the clause as to alternatives apply to the Alexandria ordinance. Interstate commerce itself knocks on the local door. It is only by regulating that knock that the interests of the home may be protected by public as distinct from private action. Likewise in *Hood and Sons v. DuMond,* it was the discrimination against out of state dealers that invalidated the order refusing a license to buy milk to an out of state distributor. Where no discrimination existed, in a somewhat similar situation, we upheld the state regulation as a permissible burden on commerce. *Milk Control Board v. Eisenberg Farm Products,* 306 U.S. 346. See in accord *Panhandle Leasing Pipeline Company v. Michigan Public Service Commission,* 341 U.S. 329.

The mere fact that a local regulation under the police power burdens interstate commerce more heavily than local businesses thus does not render it discriminatory or invalid. The suggestion by certain plaintiffs that present regulation constitutes a burden on interstate commerce because some companies cannot enter the Maryland market except by direct operation of stations is not only unsupported by the record but even if supported by it implies no constitutional violation. Any such inability is a function of a particular company's competitive weakness and not of state action. The Maryland market is open alike to local and foreign companies making sales through independent dealers and distributors including dealer and distributor chains. If Ashland or any other company is unable to penetrate the Maryland market thus made freely available because of asserted weaknesses in its images with dealers or public, Maryland is not constitutionally obliged to redress that deficiency by allowing internal vertical integration and thus compromising its policy in favor of intrabrand competition in the pricing of petroleum products and its policy against retail price

fixing of such products. Maryland was entitled to enforce its policies with respect to intrabrand competition even if the effect of these policies was to discourage the entry into the Maryland market of some companies that preferred to control prices down to the consumer level. Reliance upon Clayton Act Section 7 cases relating to the importance of competition waiting in the wings is misplaced. Section 7 of the Clayton Act is not part of the Constitution and to the extent its teachings are relevant the cases under it requiring vertical divestiture of gasoline stations by oil companies in some instances suggest congruence rather than conflict with Maryland state policy. See also *Federal Trade Commission v. Sun Oil Company,* 371 U.S. 505, 528 (1963) in which this Court recognized the legislative power to require vertical divestiture in this industry. Of a piece with plaintiffs' reliance on Section 7 Clayton Act cases are their reliance upon vague declarations in recent energy regulations of a national purpose to increase refinery capacity. The suggestion that such declarations preempt the states from passing valid police regulations is frivolous. The strength of such a policy while federally enacted price controls remain on the statute books may be doubted and the evidence of any impairment of such a policy by the Maryland Act is virtually non-existent.[12]

The contention that requiring divestiture of existing stations imposes an extraordinary burden not supported by any state interest is unfounded. The burden imposed by divestiture requirements is minimal. Re-

[12] It was asserted at trial that Hudson Oil Company, which operated stations in Maryland, would be deterred from creating new refinery capacity, or, more accurately, acquiring an existing refinery, by the divestiture provisions in the Maryland Act. Plaintiffs' briefs reveal that, notwithstanding the asserted discouragement by the Maryland Act, Hudson has in fact subsequently acquired a refinery. See Brief of Ashland, et al. at 16.

liance by plaintiffs on figures indicating the cost of their existing stations is misplaced, since the act in no way requires plaintiffs to sell either the land upon which stations are constructed or the facilities there situated, and accords the controller discretion to allow exemptions in hardship cases. The Act only requires that operation of the business be transferred to independent dealers; plaintiffs may continue to furnish petroleum products for sale at the same location. Effectuation of the policy of the divestiture statute requires not merely that acquisition of company owned stations be prevented *in futuro* but existing stations be divested. It was the purpose of the legislature to require intrabrand as well as interbrand competition, with its beneficial effect upon reduction of retail margins and pressure upon suppliers to reduce wholesale prices. This purpose would be frustrated if companies such as BP, Kayo (Continental) and Petroleum Marketing Corporation, the last two of which have been found guilty of horizontal and vertical price fixing involving their existing stations and all of which do nearly all their business in Maryland through company owned stations, were permitted to retain such stations. Similarly the danger that company owned stations at key locations might be utilized by other suppliers owning substantial numbers of such stations, such as plaintiff Exxon, in order to lead price movements in particular markets and punish disruption of "orderly marketing" by competitors was sufficient grounds for requiring divestiture of existing stations.

Grandfather clauses may be constitutionally permissible, but they impair the uniformity of legislation, inspire public disrespect for laws, and are in no sense constitutionally requisite, as numerous decisions of this Court sustaining divestiture provisions discussed in the last part of this Brief recognize.

The suggestion that the State, absent discrimination, was obliged to employ less restrictive alternatives is unfounded; see *Breard v. Alexandria,* 341 U.S. at 636-37; *South Carolina v. Barnwell Bros.,* 303 U.S. 177 (1939); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), but in any event in the present case there are no less restrictive alternatives that could be deemed reasonably effective.

The state acted reasonably in considering that permitting vertical price control by contract or by ownership would foster horizontal price fixing; such an insight has been a major justification for interdiction of resale price maintenance of all kinds since the decision of this Court in the *Dr. Miles* case. The suggestion that the state should rely on its own antitrust laws to prevent the evil effects potentially resulting from use of company ownership of stations in support of horizontal price fixing conspiracies ascribes to the antitrust laws an effectiveness that they do not possess. Indeed the recent criminal convictions in Maryland in 1977 upon an indictment alleging a conspiracy which commenced at least 10 years earlier in 1967, took place in the Federal and not state courts, and were the outgrowth not of government investigation but of the highly unusual success of private dealers in private litigation in proving a horizontal price fixing conspiracy. Plaintiffs might prefer that the state rely upon its three-member antitrust division rather than the divestiture legislation enacted here to insure the maintenance of competition in the retail sale of gasoline in Maryland, but the state is clearly not constitutionally obliged to choose ineffectual methods of implementing a valid policy.

It is suggested in *Pike v. Bruce Church*, 397 U.S. 137 (1970), that the earlier "direct" and "indirect" burden tests as well as a candid balancing test, remain relevant. If this is so, it is clear that any burden imposed here

on retailing is an indirect burden. Indeed it may be questionable that this piece of legislation is properly even analyzable as a burden. In *Hughes v. Alexandria Scrap Company,* 426 U.S. 794 (1977) a majority of this Court expressly rejected the notion that "every action by a state that has the effect of reducing in some manner the flow of goods in interstate commerce is potentially a burden." Where, as here, legislation is directed at the maintenance of competition and the prevention of price fixing and is nondiscriminatory in character, the characterization of it as a burden upon commerce at all may be inapt. Such a "burden" mode of analysis has not been pursued by the courts in analysing the application of state antitrust legislation and other divestiture statutes. See *Watson v. Buck,* 313 U.S. 387, 402 (1941); *Waters-Pierce Oil Company v. Texas,* 212 U.S. 86, 197 (1909); *National Cotton Oil Company v. Texas,* 197 U.S. 115, 129 (1905); *Hammond Packing Company v. Arkansas,* 212 U.S. 322, 343 (1909); Cf. *Washington v. Sterling Theatres Company,* 64 Wash. 2nd 761, 394 P.2d 266 (19); *Wisconsin v. Allied Chemical and Dye Corporation,* 9 Wisc. 2d 290, 101 N.W.2d 133 (19). As to divestiture provisions specifically, see *Crescent Oil Company v. Mississippi,* 257 U.S. 129, 135-36 (1921); *Paramount Pictures v. Langer,* 23 F. Supp. 890 (D. N.D. 1939) revd. as moot 306 U.S. 619 and the numerous cases discussed in the portion of this Brief dealing with due process questions. Even if divestiture laws are properly analyzed as burdens on commerce, some cases question whether a balancing test must be met for them to be valid. In *Proctor and Gamble Company v. City of Chicago,* 509 F.2d 69 (7th Cir. 1974), cert. den. 421 U.S. 978, in sustaining a Chicago ordinance against phosphate detergents drastically effecting the flow of commerce across state lines, Chief Judge Swygert, joined by Judges Fairchild and Cummings, observed, citing this Court's decision in *Brotherhood of Locomotive Firemen*

v. Chicago Rock Island and Pacific Railroad, 393 U.S. 129 (1968), sustaining the validity of the Arkansas full crew laws for railroads that:

> "there is some support . . . for the proposition that, once it is determined that the legislation is a reasonable means of achieving a nondiscriminatory legitimate goal it should be deemed constitutional and any further weighing process need not occur."

In the *Brotherhood* case this Court observed that, in conducting a weighing process and striking down the full crew laws on this basis, "the district court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the commerce clause." (393 U.S. at 136). In *American Can Company v. Oregon Liquor Control Commission,* 517 F.2d 691, 697 (Ore. Appellate 1974) it was observed that in the *Brotherhood* case this Court "recognized the inappropriateness of a weighing process in cases of noncomparable benefit and injury." This analysis was followed in *Soap and Detergent Assocation v. Clark,* 330 F. Supp. 1218 (S.D. Fla. 1971). In the *Proctor and Gamble* case the Seventh Circuit suggested an intermediate test: "if the burden on interstate commerce is slight, and the area of legislation is one which is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates to the contrary by clear and convincing proof." In the present case both courts below have analyzed the evidence to reject the proposition that the legislation here imposes an impermissible burden on interstate commerce.

C.

The Act Is Not Invalid Because It "Affects Operations Of A National Industry"

The suggestion of plaintiffs' counsel that cases like *Wickard v. Filburn,* 317 U.S. 111 (1942), recognizing the almost plenary nature of the legislative power of Congress over interstate commerce, interdict Maryland from enacting a statute regulating oil company operations at the retail level is extraordinary. Although discussions of the Robinson-Patman Act questions in plaintiffs briefs are replete with references to the scholarly literature on the appropriate construction of the act, it is no accident that plaintiffs' interest in pertinent legal scholarship evaporates when the commerce clause questions are reached. The reason is not obscure: plaintiffs' propositions are unfounded in the law and the scholarly writing on commerce clause problems gives them no support at all. For, as Professor Freund has noted, in Commerce Clause interpretation:

> "Three interrelated problems are presented: the scope of the power of Congress; the extent of the power of the states in the silence of Congress, and the effect upon state power of an exercise of Congressional authority."

Freund, *The Supreme Court of the United States* at 20 (1949). Plaintiffs invite the Court to confuse its precedents bearing upon the first and the second of these questions. Nor is it a service to clear thought about these matters to cite, as do two of the briefs, *Wickard* and the cases under the antitrust laws holding that they extend to the gasoline industry as though they have any bearing upon the negative reach of the commerce clause with respect to questions, such as divestiture of gasoline stations, which have not been addressed by Congress. For it has been clear at least since *Cooley v. Board of Wardens,* 12 Howard 299, 319 (1851) that:

> "the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities . . ."

Although plaintiffs vaguely attempt to imply that the oil industry by virtue of its importance is susceptible only of national regulation, in other portions of their briefs they urge that the state has available to it less restrictive regulatory devices, such as the regulation of gasoline franchise agreements (but not of vertical integration by ownership) worked by the Maryland Gasoline Products Marketing Act, whose validity they concede. Nor have plaintiffs been heard to assert, at least recently, the invalidity of other state regulations of the gas and oil industry, such as those of the Texas Railroad Commission. Their proposition is that the oil industry is so susceptible of national regulation that the dormant reach of the commerce clause preempts all state regulation of which they disapprove. In *Cities Service Co. v. Peerless Co.,* 340 U.S. 179 (1950) this Court rejected a contention that the closely related natural gas industry could only be regulated by the national government.

In fact the case law recognizes that even as to industries which are within the regulatory powers of Congress, many transactions are presumptively local in nature so that non-discriminatory state regulations of them are not interdicted by the negative reach of the commerce clause. See *Head v. New Mexico Board of Examiners,* 374 U.S. 424, 430 (1965); *Florida Lime & Avacado Growers v. Paul,* 373 U.S. 132, 144 (1962) and the cases following them. In *Panhandle Eastern Pipeline v. Michigan Public Service Commission,* 341

U.S. 329 (1951) this Court observed "the sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause . . .". The Maryland Court of Appeals, quite appropriately, relied upon these and other cases in support of its proposition that earlier distinctions between local and national activity while no longer the test of congressional power to regulate activities under the commerce clause may still be of some significance in determining the reach of a state's authority absent congressional preemption. See *Cities Service Company v. Peerless Company,* 340 U.S. 179, 186-87 (1950); *South Carolina Highway Department v. Barnwell Brothers,* 303 U.S. 177 (1938); *Huron Cement Company v. Detroit,* 362 U.S. 440, 443-44 (1960); *Pike v. Bruce Church,* Inc., 397 U.S. 137, 142 (1970). Regulation of retail trade is assuredly one area that may be deemed presumptively local in character. Although it has been clear since the demise of the view of the commerce clause of *Schechter Poultry Corporation v. United States,* 295 U.S. 495 (1935), that powers of national regulation now extend to the retail trades, this Court has never said, with respect to any retail trade, that the negative reach of the commerce clause absent national legislation bars non-discriminatory state legislation.

Plaintiffs also have recourse to dicta in various opinions of this Court purporting to support the notion that state health and safety laws stand on a more favored footing than state laws regulating commerce for purposes of determining whether statutes are interdicted by the negative reach of the commerce clause. Although references to this approach occasionally reappear in court opinions, the approach has long since been discarded as a touchstone for decision. It is noted by Professor Freund:

> "No more workable have been the formalistic tests essaying a distinction between laws regulating commerce and those regulating health or safety. The state law limiting the speed at which an interstate train may travel is, to the pragmatic eye, a regulation neither exclusively of commerce nor exclusively of safety but is rather something of both, and we do not escape a hard question of judgment by converting the problem of accommodation to one of semantics." Freund, *The Supreme Court of the United States* (Meridian Edition, 1961) at 100.

The unreality of such distinctions was long ago noted by Professor Frankfurter, as he then was:

> "Commercial legislation and police legislation are not discrete processes. Their manifestations are not easily differentiated by judicial scrutiny. By no form of words does the court ultimately escape considerations not sharply different from those that are the concern of a legislature." Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (1937) at 52-53.

This is certainly true of the legislation involved here. Condemnations of price fixing are sufficiently embedded in our law and policy that state legislation aimed at its eradication may fairly be deemed to partake of a police as distinct from commercial character. The present legislation does not stand on the same footing as a state restrictive licensing law. Moreover, to the degree that state law is aimed at a dispersion of power over the market it implicates, as Mr. Justice Brandeis would have reminded us, social as well as economic interests. In *Fox v. Standard Oil Company,* 294 U.S. 87, 100 (1935) in sustaining a chain store tax bearing especially heavily on oil company owned service stations, Mr. Justice Cardozo observed:

> "[a] motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of

> trade Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence."

The effect of the present legislation is to interdict arrangements pursuant to which persons who would otherwise be independent businessmen are converted into producer or refiner employees. Such legislation is not outside the mainstream of policies against restraint of trade, with their concern for independence of traders, see *Kiefer-Stewart Company v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Northern Securities Company v. United States*, 193 U.S. 197 (1904) (Holmes, J. dissenting).

The complaint by the industry that it is a national industry burdened by varying state laws, if good, would invalidate numerous and varied forms of state regulation and taxation, many of them supported by the industry and not under attack here. The burdens assertedly imposed by diversity in state enactments relating to ownership of service stations are not onerous and to the extent that they exist they are the price of life under a system of federal rather than unitary government — a system which confers important political and economic benefits upon the plaintiffs here, as upon all citizens.

Cases involving holdings that industries are the subjects of exclusive federal regulation, beginning with *Gibbons v. Ogden*, generally have involved interferences with interstate transportation, and not state regulation of manufacturing, let alone of retail trade. Thus in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945) the statute invalidated was a state train length law. In *Bibb v. Najavo Freight Lines, Inc.*, 359 U.S. 520 (1959) an Illinois statute requiring contour mud guards on interstate trucks was invalidated since it required interchange of mud guards at state lines "causing a significant delay in operation where prompt movement may be of the essence." Cases discussing the

negative reach of the commerce clause with respect to issues of state judicial as distinct from legislative jurisdiction reflect a similar development. The early case of *Davis v. Farmers Cooperative Equity Company*, 262 U.S. 312 (1923) quashing service of an extrastate cause of action against a corporation involved in interstate commerce on commerce clause grounds has been restricted by subsequent decisions to cases "where the defendant is a common carrier and the effect of the suit is actually to tie up carriage in interstate commerce of goods" Leflar, *American Conflicts Law* (1968 Edition) Section 37, citing *International Milling Company v. Columbia Transportation Company*, 292 U.S. 511 (1934) (Cardozo, J.) and *Standard Oil Company v. Superior Court*, 44 Del. (5 Terry) 538, 62 A.2d 454 (1948) appeal dismissed, 336 U.S. 930 (1949). Even as to the transportation industries, exclusivity of federal regulation is not lightly found. See *South Carolina v. Barnwell Brothers, supra; Huron Portland Cement Company v. Detroit, supra; Brotherhood of Locomotive Firemen v. Chicago Ry, supra.* Against this background the suggestion that the distribution of petroleum at retail is the subject of exclusive national regulation is simply frivolous.

III.

THE DIVESTITURE PROVISIONS DO NOT CONTRAVENE THE DUE PROCESS CLAUSE.

In believing that price fixing and other abuses at one level of distribution might best be guarded against by severing its ownership from that of higher levels of distribution, the General Assembly acted in a long and well established tradition. Numerous enactments, state and federal, requiring the severance and divestiture of differing sorts of businesses, some in the same chain of distribution, have been enacted, sometimes after sharp political controversy, and have been upheld by the Supreme Court of the United States and by other

Courts. Some of the most dramatic episodes of modern political history center on some of these enactments. The statutes embodying and upholding the principle include the Commodities Clause of the Hepburn Act, 49 U.S.C. §1(i) prohibiting railroad companies from transporting commodities manufactured, mined or produced by them; the so-called "Death Sentence" provision of the Public Utility Holding Company Act, 15 U.S.C. §79(K) requiring the divestiture by holding companies of the larger part of the public utility plant of the country; the provisions of the Federal Alcohol Administration Act, 27 U.S.C. §205, prohibiting the maintenance of so-called "tied houses" by distillers and producers of alcoholic beverages and analogous state laws; the provisions of the Glass-Steagall Act prohibiting national banks from underwriting securities and limiting the capacities in which they may purchase and sell securities (12 U.S.C. §24(7)); prohibiting national banks from being affiliated with entities engaged in the purchase, sale or underwriting of securities (12 U.S.C. §377) and prohibiting entities engaged in the purchase, sale or underwriting of securities from participation in the banking business (12 U.S.C. §§78 and 378); as well as Federal statutes barring airlines from allied transportation businesses (49 U.S.C. §1378). State statutes in the alcoholic beverage field and other state statutes precluding businesses engaged in cotton ginning from engaging or continuing to engage in related activities, requiring corporations to divest themselves of farm lands, and requiring producers and distributors of motion pictures to divest motion picture theatres have been upheld. The principal statutes and cases sustaining limitations upon vertical integration and programs of compulsory divestiture are considered hereafter in turn.

THE COMMODITIES CLAUSE OF THE HEPBURN ACT

During the Administration of President Theodore Roosevelt Congress enacted, after furious political controversy and in the fact of spirited lobbying by the nation's railroads, the Commodities Clause of the Hepburn Act, enacted by the Act of June 29, 1906 and now codified as 49 U.S.C. §1(8). That statute provides:

> "It shall be unlawful for any railroad company to transport * * * any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The statute came under immediate attack and was actually invalidated by divided decision of the United States Court of Appeals for the 3rd Circuit (*United States v. Delaware and Hudson Company* 164 Fed. 215 (3rd Circuit 1908).

The statute was defended by Learned Hand, then a member of the Bar, in a notable article in the Harvard Law Review, Hand, *The Commodities Clause and the Fifth Amendment,* 22 Harvard L. Rev. 250 (1909). The article noted that the Act was conceived as a remedy for rate discrimination just as the statute presently under challenge was conceived as a remedy for evils arising from vertical price fixing and its invitation to horizontal price fixing. To the objections of the railroads that the Act punished innocent and guilty railroads alike Hand observed:

> "The second defense for the Act is that it will prevent the commission of what would be conceded wrongs, but which are difficult of discovery or punishment. The facts are peculiarly within the carrier's knowledge. It is only by an inquisition that one can ascertain whether the service ren-

dered a shipper is all that he can fairly ask, and whether or not he is being oppressed either to give the carrier's trade the first facilities or to drive him to terms. It is of course true that to forbid the carrier from carrying his own goods may result in preventing much carriage which is quite innocent, and not within the purview of the Act at large. It is however by no means unheard of in our law, and therefore out of its 'due process', to forbid conduct which may be overt evidence of either an innocent or guilty act, but as to which it is difficult to know whether it is in fact one or the other. The curtailment of the liberty of the innocent citizen is justified by the prevention of wrongs which are impossible to detect. Thus we all know that the carrying of concealed weapons or the possession of burglarious tools or counterfeit money, or of game out of season, is each criminal, though all may be quite harmless in the individual case. On the whole there is reason to believe that they are not innocent in the majority of cases, and the State may prevent much wrong at the expense of little hardship. As in much other legislation, the result is determined by an account in which there is a debit, as well as a credit, column. Similarly, the purpose which justifies the statute of frauds depends upon the fact that the oral evidence accessible for contracts is doubtful and difficult to procure. Many good contracts go by the board that false contracts may not be foisted upon the citizen. His 'liberty' to make a valid oral contract is taken from him because he is protected in the end more completely." (at 256-57).

"In the case of the Commodities Clause the same reasoning applies. It is certainly not for the courts to say that the practice of transporting its own products by railroads does not lend itself to a violation of the law against discrimination, which it is impossible or difficult to detect; whether that danger is of enough importance to justify so drastic a measure as the total prohibition of the trade, would seem to be exclusively a matter for the legislature." (at 258).

With respect to the argument that as applied to railroads already possessing mining properties the statute would impair vested rights Judge Hand had this to say:

> "The gravamen of the defendant's appeal consists in the assertion that many millions of dollars of their property will be destroyed. Let us suppose that in an attempted compliance with the statute they distributed to their shareholders certificates of interest in coal lands, or coal shares, similar to the 'ore certificates' issued sometime since by the Great Northern Railway under no compulsion whatever. This would require the conveyance of title in the lands, or in the shares, to trustees, but the shareholders in the end hold the same proportionate interest in the coal through certificates as they did formerly through their ownership in the stock* the legal title of the property would by hypothesis pass from the carriers and be vested in trustees. The ultimate beneficial interest would remain the same. In the case of the Great Northern Railway no contest was made* — or at least none was made in good faith — when the change took place. It was recognized as a legitmate method of internal management and no one considered that his 'property' had been effected. It may be that such a distribution would affect the value of the securities; but it is important to remember that some of the decrease in value may be the measure of that very advantage of discrimination and of ultimate monopoly which it is the purpose of the Acts to destroy. Insofar as the fall in such shares reflects the popular estimate of the loss in the carriers' ability to market their coal upon more advantageous terms then independent shippers, and to control all the supply, in just so far, the 'property' so 'taken' consists only of their practical security from detection in the commission of crimes. That is a 'property' which the court cannot consider".

The statute here under attack does not even require the oil companies to divest the real estate on which their stations are situated or even the physical plant of

the stations themselves; they may comply either by sale or by lease to independent dealers.

In fact, the Third Circuit decision criticized by Judge Hand was shortly thereafter reversed by the Supreme Court of the United States in *United States v. Delaware and Hudson Company,* 213 U.S. 366, 415, 53 L. Ed. 836 (1909). In rejecting the due process clause claims the Supreme Court observed:

> "We think it necessary to consider at length the contentions based upon the due process clause of the fifth amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause, interpreted as the government construed it. For the purpose of our consideration of the subject, it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criteria by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappears as a result of the construction which we have given the statute."

In the subsequent case of *Delaware Railway Company v. United States,* 231 U.S. 363, 58 L. Ed. 269 (1913) the Supreme Court disposed of the argument that the statute was invalid insofar as it sought to regulate the activities of railroads in private businesses then not subject to federal regulation, the mirror image of the

plaintiff's argument here that the State may not by regulating retail activities within its control affect producing or refining activities beyond its borders:

> "The Commodities Clause* does not take property nor does it arbitrarily deprive the Company of the right of property. The statute deals with railroad companies as public carriers and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning the carriers so as not to interfere with them as miners or merchants* the Commodities Clause was not an unreasonably and arbitrary prohibition against a railroad company transporting its own useful property but a constitutional exercise of the governmental power intended to cure or prevent the evils that might result if in hauling goods in or out the company occupied the dual and inconsistent position of public carrier and private shipper* the statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented."

The "Death Sentence" Provision of the Public Utility Holding Company Act

15 U.S.C., §79(K) was enacted in 1935, after heated controversy. The statute empowered and required the Securities Exchange Commission as soon as practicable after January 1, 1938 to require each utility holding company to take such actions as the Commission found necessary to limit its operations to a single integrated public utility system and other businesses reasonably incidental to it and to permit additional integrated public utilities systems to be controlled only if each of the additional systems could not be operated as an independent system without the loss of substantial economies and all of such additional systems were located in one state or in adjoining states or in an adjoining foreign country and the continued combina-

tion of such systems was not so large as to impair the advantages of localized management. It was the Commission's unqualified duty to require the dissolution of systems not located in one state or in adjoining states or in a contiguous foreign country. The statute was sustained by this Court, which noted:

> "In fashioning the remedy decreed by Section 11B1 Congress was following a pattern set many years ago by decisions applying the Sherman Antitrust Act, Northern Securities Company v. United States 193 U.S. 197 48 L. Ed. 679 Standard Oil Company v. United States 221 U.S. 1 55 L. Ed. 619 Continental Insurance Company v. United States 259 U.S. 156 66 L. Ed. 871 and the Commodities Clause of the Hepburn Act, United States v. Lehigh Valley Railway Company 220 U.S. 257 55 L. Ed. 458 United States v. Delaware Railway Company 238 U.S. 516 69 L. Ed. 1438." (327 U.S. at 707).

With respect to the claim that the statute contravened vested rights the Court stated:

> "The constitutionality of Section 11B-1 is also questioned from the standpoint of the due process clause of the fifth amendment. North American argues that this section, by compelling it to divest itself of its scattered subsidiaries to confine its operations to the single intergrated system, involves a taking of property without just compensation. It is also claimed that such evils as were found to exist in public utility holding companies find an adequate remedy in other sections of the Act and that Section 11B1 is therefore inappropriate. Neither contention is meritorious. The contention also is made that the fact that Section 11B1 requires disposition of security holdings and termination of relationships which antedate the passage of the act is fatal to its validity. But it merely requires that such holdings and relationships shall not continue in the future. There is no punishment for past offenses. Certainly there is no constitutional requirement that the status quo be maintained. See United States v. Trans Missouri

> Freight Association 166 U.S. 290, 342 41 L. Ed. 1007, 1028. The taking of property is said to involve 'a vast destruction of values'. Reference is made in this respect to the valuable right of North American's shareholders to pool their investments and thereby obtain the benefit alleged to flow from efficient common management of diversified interest. The Congress balanced the various considerations and concluded that this right is clearly outweighed by the actual and potential damage to the public, the investors and the consumers resulting from the use made of pooled investments. Under such circumstances whatever value this right may have does not foreclose the protection of the various interests which Congress found to be paramount. See Northern Securities v. United States 193 U.S. 197 48 L. Ed. 679.* Under Section 11C holding companies are given at least a year to comply with an order of the Commission under Section 11B. The Commission is also authorized to extend the time for an additional year upon a proper showing."

North American Company v. Securities and Exchange Commission, 327 U.S. at 708-710.

The provisions alluded to in the North American case as moderating the effect of the statute are strikingly similar to the provisions of the Act here under challenge. The statute here under challenge was effective July 1, 1974 but did not purport to require divestiture until July 1, 1975 and then requires divestiture not of real or personal property but only of operation of stations. Moreover, Article 56, Section 157E(G) provides that the Comptroller "may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer operated station." Furthermore, Article 56, Section 157E(H) provides that:

> "The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts

and reaching reasonable conclusions based upon those facts."

This provision for delay in the event of hardship is no less specific than and indeed is more generous than the provisions of Section 11C of the Public Utility Holding Company Act which limited permissible delay to one year.

The subsequent case of *American Power and Light Company v. Securities and Exchange Commission* 329 U.S. 90, expressly sustained the provision delegating to the Securities and Exchange Commission the delay power conferred upon it by the Act. The vague language used in the Act relating to "unduly complicated corporate structures and inequitable distributions of voting power" was held sufficient "even standing alone" (329 U.S. at 104). The Court observed "these standards are certainly no less definite in nature than those speaking in other contexts in terms of 'public interest', 'just and reasonable rates', 'unfair methods of competition' or 'relevant factors'. The approval which this court has given in the past to those standards thus compels the sanctioning of the ones in issue. See *New York Central Securities Corporation v. United States* 287 U.S. 12, 24, 25, 77 L. Ed. 138, 145, 146; *Yakus v. United States,* 321 U.S. 414, 419-427, 88 L. Ed. 834, 845-848." (329 U.S. at 105).

The Appellants here can scarcely have the Court believe that the words "relevant factors" announce a proper standard under the rule in the *American Power and Light Company* caase but the words "relevant facts" in Article 56, Section 157E(H) somehow declare an improper standard.

Indeed the *American Power & Light Company* case allowed the Commission to proceed on a case by case basis. In the present instance the Comptroller has declared his intention to proceed by promulgating regulations:

"Nor is there any constitutional requirement that the legislative standards be translated by the Commission into formal and detailed rules of thumb prior to their application to a particular case. If that agency wishes to proceed by the more flexible case by case methods, the Constitution offers no obstacle." (329 U.S. at 106).

The decisions of the Supreme Court in the *North American* and *American Power and Light Company* cases were not casual holdings. The controversy over the Act and its validity was a controversy that engulfed the country. "According to its defenders, the holding company was necessary to bring operating companies capital and credit; it was necessary to bring operating companies skilled management; and it was necessary because compulsory dissolution under the 'Death Sentence' would destroy the funds innocently invested in holding companies by millions of Americans, largely (apparently) widows and orphans." Schlesinger, *The Politics of Upheaval* (1960) at 308. The position of those favoring divestiture was the position usually taken by advocates of statutes such as those at issue here: that the dimensions of the interests sought to be regulated and the possibilities for abuse inherent in them rendered impossible effective regulation by any means short of the restoration of competition through a divestiture proceeding. Absent divestitute, the draftsman of the Public Utility Holding Company Act observed: "It is just a mere problem of arithmetic. How much money have you against how much money? How many good lawyers have you against how many good lawyers? Those are the actualities of the regulatory process — the drip, drip, drip of pressure and influence; the outmaneuvering, the outbraining, which will simply make it impossible to handle these aggregations of power." Id at 309 (quoting Thomas G. Corcoran, Jr.).

Exclusion Of Airlines From Related Businesses

49 U.S.C. Section 1378 makes it unlawful unless approved by special order of the Civil Aeronautics Board "for any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties or any substantial part thereof of any air carrier" or, conversely, for any "air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties or any substantial part thereof any person engaged in any phase of aeronautics otherwise than as an air carrier." Section 1378 (A)(7) makes it unlawful "for any person to continue to maintain any relationship established in violation of any of the aforegoing subdivisions of this subsection." This statute has been applied in numerous cases. See *North American Airlines, Inc., v. Civil Aeronautics Board* 240 F.2d 867 (D.C. Circuit 1957) *Continental Southern Lines v. Civil Aeronautics Board* 197 F.2d 397 (D.C. Circuit 1952); see *Hughes Tool Company v. Trans World Airlines* 409 U.S. 363 (1973).

The Federal Alcohol Administration Act

27 U.S.C. Section 205, the tied-house provision of the Federal Alcohol Administration Act is a provision which finds its analogies in many state laws, See deDanahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry,* 7 Law and Contemporary Problems 665, 667 (1940); Note, *A Comparative Survey of Post Repeal Liquor Legislation,* 83 U. Pa. L. Rev. 510, 518 (1935). The statute prohibits anyone engaged in business as a wholesaler of distilled spirits, wine, or malt beverages from directly or indirectly or through an affiliate inducing any retailer to purchase such

products to the exclusion of products sold by other persons through the use of enumerated means:

> "(1) by acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied or used by the retailer in the conduct of his business" among other practices.

The statute has been frequently applied without any question of its constitutionality. See, e.g. *Levers v. Anderson,* 153 F.2d 1008 (10th Cir. 1946). Similar state laws have been upheld. See *Lever v. Cornelius,* 72 Wash. 129, 129 P. 911 (1913) and cases following it.

The Glass-Steagall Banking Act

The Glass-Steagall Act of 1933, enacted immediately after the 1933 Bank Holiday to divorce the businesses of commercial and investment banking contained numerous provisions of a character similar to that of the statute at issue here. 12 U.S.C. Section 24(7) barred national banks from underwriting securities and limited the capacities in which they might purchase and sell securities, the statute being equally applicable to banks engaged in these activities prior to its effective date. 12 U.S.C. §377 prohibited banks from being affiliated with entities engaged in the purchase, sale or underwriting of securities from engaging in the banking business. 12 U.S.C. §78 prohibited interlocking directorates between national banks and businesses engaged in the purchase, sale or underwriting of securities. The statute has been construed and enforced by the courts and its provisions have been read sympathetically and broadly, its constitutionality remaining unquestioned. See *Board of Governors v. Agnew,* 329 U.S. 441 and more recently *Investment Company Institute v. Camp,* 401 U.S. 617 (1971) holding the sale of mutual investment funds by banks to be

violative of theAct.[13] See also 12 U.S.C.A. §1843(a)(2) (Bank Holding Company Act of 1956).

STATE LAWS RELATING TO ACTIVITIES OF COTTON GINS

In *Crescent Oil Company v. Mississippi,* 257 U.S. 129, (1921), the Supreme Court upheld a Mississippi statute which prohibited corporations, domestic or foreign, from owning or operating any cotton gin where such corporations were interested in the manufacture of cotton seed oil or cotton seed meal. Affected corporations were permitted to operate their gins "for a reasonable period until they may be sold" (257 U.S. at 132). The Act was upheld against challenge that it burdened interstate commerce and that, being, applicable to corporations only, it violated the equal protection clause. The contentions relative to interstate commerce were rejected. On the Equal Protection Clause question, the Court observed:

> "Whereas we have found in this case that the foreign corporation has no federal right to continue to do business in the state and whereas no contract right is involved and there is no employment by the federal government it is the settled law that a state may impose conditions in its discretion upon the right of such a corporation to do business within the state even to the point of excluding it altogether* and in such case the inherent difference between corporations and natural persons is sufficient to sustain the classification making restrictions applicable to corporations only. This would be sufficient to dispose of this second contention but we may add that the law assailed was enacted by the State in the exercise of its

[13] An effort has been made by some of the plaintiffs to suggest that the preceding cases are inapplicable because they involved wholly or partially regulated industries. However, the fact that an industry is already subject to public control against monopolistic abuse would logically seem to weaken rather than strengthen the case for divestiture statutes resting on the premise that divestiture is necessary to prevent such abuse.

> police power to prevent a practice conceived to be promotive of monopoly, with its intended evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the fourteenth amendment, and also that every state of fact sufficient to sustain such a classifications can be reasonably conceived of as having existed when the law was enacted will be assumed."

The opinion of the Supreme Court in the *Crescent Oil case* has been approvingly cited by the Court of Appeals of Maryland in *Yarger v. State,* 175 Md. 220, 230 and, even more pertinently, in *Brooks v. State Board of Funeral Directors* 233 Md. 99 (1963). In that case, the Court of Appeals, in sustaining a statute prohibiting corporations from engaging in the practice of funeral directing noted that:

> "The sweep of the Liggett[14] case was already limited by the action of the Supreme Court in Markmann Funeral Home, Inc. v. Ryan 300 U.S. 639* 81 LED 855. There the Supreme Court dismissed an appeal from a decision of the Supreme Court of Pennsylvania* sustaining as applied to a Delaware corporation a statute almost identical with the one involved in this case. In so doing, the Supreme Court cited Crescent Cotton Oil Company v. Mississippi 257 U.S. 129, 137* 66 LED 166, where the court had sustained as applied to a foreign corporation already engaged in doing business within a state a statute prohibiting corporations interested in the manufacture of cotton seed oil from operating cotton gins. That statute, moreover, unlike those in Liggett, Markmann and the instant case, did not contain a grandfather clause permanently protecting the interests of existing corporations." (195 A.2d at 735).

[14] *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928), overruled in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973).

State Statutes Requiring Divestiture Of Farm Land By Corporations

A North Dakota statute prohibited and continues to prohibit corporations from owning farm land in that state, other than land owned as a necessary part of a non-farming business. Corporations owning such land were required to divest it over a ten-year period. The statute was sustained by a unanimous Supreme Court against attack on commerce clause, due process, equal protection and vested rights theories in *Asbury Hospital v. Cass County,* 326 U.S. 207, 211-12 (1945), the court declaring in emphatic terms:

> "The Fourteenth Amendment does not deny to the state power to exclude a foreign corporation from doing business or acquiring or holding property within it. Horn Silver Min. Co. v. New York, 143 U.S. 305, 312-315, 36 L. Ed. 164, 156, 168, 12 S. Ct. 403, 4 Inters. Comm. Rep. 57; Hooper v. California, 155 U.S. 648, 652, 39 L. Ed. 297, 298, 15 S. Ct. 207, 5 Inters. Comm. Rep. 610; Munday v. Wisconsin Trust Co. 252 U.S. 499, 64 L. Ed. 684, 40 S. Ct. 365; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 137, 66 L. Ed. 166, 171, 42 S. Ct. 42. While recognizing the unqualified power of the state to preclude its entry into the state for these purposes, appellant points out that the state has permitted it to enter and to invest its money in obligations secured by mortgage on land within the state, in consequence of which it lawfully acquired the land free of restrictions. Appellant argues that the state may not, by later legislation, force a sale of the land thus innocently acquired, under conditions which do not allow recovery of the original investment. But a state's power to exclude a foreign corporation, or to limit the nature of the business it may conduct within the state, does not end as soon as the corporation has lawfully entered the state and there acquired immovable property. Subsequent * legislation excluding such a corporation from continuing in the state has been sustained as an exercise of the general power to exclude foreign corporations which does not offend due process. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 342, 343, 53 L. Ed. 530, 540, 541, 29 S. Ct. 370, 15 Ann. Cas. 645, supra; see also Baltic Min. Co. v. Massachusetts, 231 U.S. 68, 83, 58 L. Ed. 127, 133, 34 S. Ct. 15. Similarly, this Court has upheld legislation imposing burdens greater than those to which such corporations were subject at the time of their entry on the ground that the state might exclude them altogether at a later date. Fire Assoc. of Phila. v. New York, 119 U.S. 110, 31 L. Ed. 342, 7 S. Ct. 108; Horn Silver Min. Co. v. New York, 143 U.S. 305, 36 L. Ed. 164, 12 S. Ct. 403, 4 Inters Comm Rep. 57, supra; see also Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 66 L. Ed. 166, 42 S. Ct. 42 supra; Lincoln Nat. L. Ins. Co. v. Read, 1944 Term, decided June 11, 1945 [325 U.S. 673, 89 L. Ed. 1861, 65 S. Ct. 1220]. Appellant, even if its activities in North Dakota are now restricted to the ownership of farm land within the state, stands in no better position to invoke the protection of the Fourteenth Amendment. The total exclusion of a corporation owning fixed property within a state requires it to sell or otherwise dispose of such property. Appellant must do no more. While appellant is not compelled by the present statute to cease all activities in North Dakota, the greater power includes the less.
>
> Since the state may validly require appellant to sell its farm land, the contention that the statute is wanting in due process because conditions have been such since its enactment that appellant has been and will be unable to salvage an investment made more than ten years before raises no substantial constitutional question. The due process clause does not guarantee that a foreign corporation when lawfully excluded as such from ownership of land in the state shall recapture its cost. It is enough that the corporation, in complying with the lawful command of the state to part with ownership, is afforded a fair opportunity to realize the value of the land, and that the sale, when required, is to be under conditions reasonably calculated to realize its value at the time of sale."

The statute was again upheld in 1971 in *Coal Harbor Stock Farm, Inc. v. Meier,* 191 N.W.2d 83 (N.D. 1971).

State Legislation Requiring Divestitute Of Motion Picture Theatres By Motion Picture Producers

Perhaps the decided case most closely in point on the issue presented in the present case is the decision of the United States District Court for the District of North Dakota in *Paramount Pictures v. Langer* 23 F. Supp. 890 (D.N.D. 1938) sustaining the constitutionality of a statute prohibiting the operation of motion picture theatres owned, controlled, managed or operated in whole or in part by producers or distributors of motion picture films, or in which producers or distributors have any interests. The statute was sustained both as applied to future opening of theatres and to require the divestiture of some ten theatres already owned by the producers in the State. The significance of the case as a precedent is no way altered by the fact that the statute was subsequently repealed by the North Dakota legislature resulting in the subsequent reversal as moot of the order of the District Court, 306 U.S. 619 83 L. Ed. 1025. The case, notwithstanding that it was tried in North Dakota, was argued on both sides by eminent counsel from outside the State and received national attention. See Comment, *Enforced Independence for Motion Picture Exhibitors,* 48 Yale L.J. 339 (1938). It was decided by a three judge District Court. In the course of a comprehensive opinion the court stated, on the commerce clause and due process issues:

> Some of the issues presented for determination can be eliminated without lengthy discussion.
>
> * * *
>
> It seems clear to us that any remote effect that the Act might have upon the distribution of films in interstate commerce or upon the rights of

> producers or distributors under the Copyright Law could not sustain a conclusion that the Legislature of North Dakota had invaded a field exclusively reserved to the Congress of the United States. As to interstate commerce, see Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 426, 56 S. Ct. 513, 515, 80 L. Ed. 772; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 135, 136, 42 S. Ct. 42, 43, 66 L. Ed. 166.
>
> (2) We see no merit in the contention that the Act can not be justified as a measure intended to safeguard the public health, safety or morals, because (1) there is no basis for believing that the operation of affiliated theatres in the State has, or will have, any reasonable relation thereto, and (2) any indirect effect which the presence of these 10 affiliated theatres in the State might possibly be conceived to have on the health, safety and morals of their patrons would not warrant excluding them from the State. * * *
>
> * * * * * *
>
> The vital and controlling question in these cases, as we see it, is whether the Act is violative of the due process clause of the Fourteenth Amendment in that it has no reasonable relation to the prevention of monopoly, restraints of trade, unfair competition, unfair trade practices, or the maintenance in North Dakota of a free and open market for motion picture films, in which market all exhibitors may compete on a substantially equal basis. * * *
>
> This Act did not originate from conditions peculiar to North Dakota, but grew out of a nation-wide controversy of long standing between independent or unaffiliated motion picture exhibitors and those producer-distributors who had entered the exhibition field through acquiring theatres or interests in theatres in theatres. The independent exhibitors, through their trade association, caused the Act to be drafted, and sponsored it before the North Dakota legislature. Its introduction in the legislatures of other states was procured, but apparently North Dakota is the first state which has adopted it. * * *

We have no doubt, however, that a state legislature for the purpose of shaping its laws and of guarding against evils which have, or which it may reasonably believe have, developed elsewhere, may look beyond the boundaries of its own state. See Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 527, 57 S. Ct. 772, 778, 81 L. Ed. 1193, 112 A.L.R. 293; Hammond Packing Co. v. Arkansas, 212 U.S. 322, 343, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645.

The power of a legislature to deal with practices and situations which may reasonably be conceived to be promotive of monopoly and restraints of trade, is not subject to question. National Cotton Oil Co. v. Texas — 197 U.S. 115, 129, 25 S. Ct. 379, 49 L. Ed. 689; Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 137, 42 S. Ct. 42, 44, 66 L. Ed. 166.

In these cases the plaintiffs deny that they have suppressed local competition or attempted to control prices, and their main attack upon the Act in suit is that it violates due process. In the respects pointed out, these cases differ from the Crescent Cotton Oil Co. Case, but there is evidence in the record here which justifies an inference of suppression of local competition in states other than North Dakota by producers having affiliated theatres; and the evidence also discloses the existence of the power and the temptation of such producers to engage in practices promotive of monopoly and restraint of trade.

It is our opinion that the existence of unusual power to deal with competitors unfairly, when coupled with the opportunity and the temptation to use that power, is probably a sufficient basis for legislative action to prevent the possibility of its exercise. This must certainly be so where there is, in addition, evidence of past aggressions.

[l]egislative as well as judicial action to curb what may honestly be believed to be monopolistic tendencies can be based upon a reasonable and justified fear that a powerful corporation or group

of corporations possessing the power to unjustly handicap competitors, and faced with the temptation to use that power, may do so if not prevented.

The Legislature of North Dakota apparently had before it all of the facts and circumstances which tended to show that the combining of production, distribution and exhibition of motion pictures created advantages which no independent exhibitor could possess, and placed those who had combined these three branches of the industry in a position to destroy or injure competition. The Legislature also apparently had before it the facts which the producers contend indicate that, even if they have these advantages, they have not used them, and that the market for motion pictures is still virtually a free and open market. We think that the question of the necessity of a law to prevent the coming into existence in North Dakota of unfair competitive practices asserted to have occurred elsewhere and of restraints of trade in the business of exhibition of motion pictures was a matter for the Legislature to decide, and that its determination of this question, under the circumstances, is conclusive upon this Court.

The fact that the Act here in question was passed primarily in the interests of a class would not render it invalid. In Nebbia v. New York, *supra*, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469, the state statute there under consideration dealt primarily with those engaged in a single industry. The same was true in the case of Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 56 S. Ct. 453, 80 L. Ed. 669. There can be no doubt of the right of a state, within constitutional limits, to protect and foster any industry within its borders and to pass reasonable legislation in the interests of its citizens who are engaged in that industry. Moreover, in the Nebbia Case (pages 524, 525 of 291 U.S., page 510 of 54 S. Ct.) the Supreme Court pointed out that "no exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of

the citizen which will not to some extent abridge his liberty or affect his property."

Our conclusion is that the policy declared by the Act in suit has a reasonable relation to a proper legislative purpose.

There is, no doubt, force in the plaintiffs' contention that the Act goes beyond the necessities of the situation with which the Legislature was dealing. As already pointed out, the plaintiffs had operated 10 theatres in the State for some eight years. It can reasonably be believed that an act which would have prevented the operation of any more affiliated theatres in the State would have served every useful purpose. Such a law, however, might have been challenged on the ground that it was subject to the same infirmity as the statute which was held invalid in Mayflower Farms v. Ten Eyck, 297 U.S. 266, 56 S. Ct. 457, 80 L. Ed. 675, for discriminating between those entering a business before April 10, 1933, and those entering the business afterwards. However that may be, the Legislature was certainly primarily the judge of what means should be used to secure the enforcement of the economic policy which it had adopted. Had there been no affiliated theatres in the State, the Act prohibiting the operation of any affiliated theatre could hardly have been regarded as harsh or oppressive. If it was within the police power of the State to exclude affiliated theatres before any had come into existence, it was within its power to prevent the operation of such theatres after they had come into existence. The fact that the theatres here involved were acquired before their operation was forbidden could not limit or restrict the police power of the State. Mugler v. Kansas, 123 U.S. 623, 669, 8 S. Ct. 273, 31 L. Ed. 205. Moreover, while this Act deprives the plaintiffs Minnesota and American of the right to operate their theatres in North Dakota so long as Paramount has any interest in them, it does not in reality destroy the value of the investment nor take away the right to operate the theatres as theatres if Paramount shall divorce itself from any interest in them.

Laws requiring the divorcement of certain classes of business are not a novelty in this country. Congress has prohibited carriers from transporting coal produced by companies in which the carrier has an interest. United States v. Delaware & Hudson Co., 213 U.S. 366, 29 S. Ct. 527, 53 L. Ed. 836; United States v. Lehigh Valley R. Co., 220 U.S. 257, 31 S. Ct. 387, 55 L. Ed. 458. Congress has exercised the power (delegated it to a commission) to require certain corporations engaged in interstate commerce to divorce themselves of stock in subsidiary corporations. Federal Trade Commission v. Western Meat Co., 272 U.S. 554, 47 S. Ct. 175, 71 L. Ed. 405. The State of Mississippi, as already pointed out, enacted a law to prevent corporations engaged in manufacturing cotton-seed oil and meal from operating cotton gins. Crescent Cotton Oil Co. v. Mississippi, supra, 257 U.S. 129, 42 S. Ct. 42, 66 L. Ed. 166. The State of Arkansas passed an act, Acts Ark. 1905, p. 1, providing that corporations engaged in a combination or trust outside the State should not do business within the State. Hammond Packing Co. v. Arkansas, supra, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645. These enactments have been sustained. Congress recently enacted laws separating the business of banking and investment. 48 Stat. 162, 188, 12 U.S.C. §377, 12 U.S.C.A. §377. By the Public Utility Holding Company Act of 1935, 15 U.S.C. §79 et seq., 15 U.S.C.A. §79 et seq., Congress provided for the disintegration of the public utility holding company systems. States have passed legislation divorcing the businesses of banking and investment, and laws prohibiting manufacturers and wholesalers of whisky from engaging in or having any interest in liquor retail stores. Grain warehousemen are forbidden in Illinois from engaging in grain trading. Central Elevator Co. v. People 174 Ill. 203, 51 N.E. 254, 43 L.R.A. 658.

That we might be of the opinion that the Legislature of North Dakota could have dealt adequately with the problem sought to be solved by this challenged legislation in some different or more moderate way, would not justify us in striking down this Act as being harsh and unreasonable. If

the subject matter of the legislation was within the legislative authority, the policy declared and the means of its enforcement were, within very broad limits, for the Legislature to decide.

CONCLUSION

The economic realities underlying the effort made by the Maryland General Assembly in seeking to limit control by the oil companies over the retail pricing of gasoline by excluding them from the ownership of retail gasoline stations have long been recognized. In *Fox v. Standard Oil Company*, 294 U.S. 87, 79 L. Ed. 780 (1935) Justice Cardozo, speaking for the Supreme Court in sustaining a chain store tax bearing especially heavily on chains of gasoline stations owned by oil companies noted that:

> "The effect of multitudinous agencies, reaching into every corner, and yet subject to regulation at a center, is to fix a uniform retail price to which independents must conform as the price of their existence. They are independent in name only, for the chain sets the pace, and even in competing they are subject to its mastery." (294 U.S. at 99).

In recognition of the existence of this economic reality where producers and refiners of gasoline are permitted to directly engage in its retail sale, the General Assembly enacted Chapter 854 of the Acts of 1974. Its action in so doing was reasonable and must be sustained.

Respectfully submitted,

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December 17, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion for Leave to File a Brief of Amici Curiae and Brief of Amici Curiae were mailed, this 17th day of December, 1977, to J. Edward Davis, Esquire, Weinberg & Green, 10 Light Street, Baltimore, Maryland 21202; Lawrence S. Greenwald, Esquire, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, 1200 Garrett Building, Baltimore, Maryland 21202; Lewis A. Noonberg, Esquire, Piper and Marbury, 2000 First Maryland Building, 25 South Charles Street, Baltimore, Maryland 21201; David Ginsburg, Esquire, Ginsburg, Feldman and Bress, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006; Wilbur D. Preston, Jr., Esquire, Whiteford, Taylor, Preston, Trimble & Johnston, IBM Building, 100 East Pratt Street, Baltimore, Maryland 21202; William Simon, Esquire, Howrey & Simon, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006; and to The Honorable Francis B. Burch, Attorney General of Maryland, One South Calvert Street, Baltimore, Maryland 21202.

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